TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 234

G. F. ALBIN, PETITIONER,

vs.

COWING PRESSURE RELIEVING JOINT COMPANY, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1942.

CERTIORARI GRANTED OCTOBER 12, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

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G. F. ALBIN, PETITIONER,

vs.

COWING PRESSURE RELIEVING JOINT COMPANY, ETC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

In Bankruptcy No. 77464

In the Matter of Cowing Pressure Relieving Joint Company, An Unincorporated Company or Association, An Alleged Bankrupt

Petition By Creditor for Involuntary Adjudication—Filed February 9, 1942

To the Honorable, the Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division:

The petition of G. F. Albin, of the City of Chicago, Illinois, respectfully represents:

1. Cowing Pressure Relieving Joint Company is an unincorporated company or association, and is engaged in the business of manufacturing and selling lead joints for buildings; and has had its principal place of business at 226 West Superior Street, Chicago, Illinois, within the above judicial district for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Said Cowing Pressure Relieving Joint Company owes debts to the amount of $1,000 and over and is a person who could be a bankrupt under Section 4 of the Bankruptcy Act.

3. The creditors of said Cowing Pressure Relieving Joint Company are less than twelve in number, and your petitioner is one of its creditors, having a provable claim amounting to the sum of $500 and more in excess of securities held by your petitioner, said claim being for moneys which became due Peter Masterson for salaries or for [fol. 4] moneys advanced by him to said company in the sum of $2,620.12 and in additional amounts, and which claims were acquired by your petitioner by purchase from John H. Chatz, Trustee in Bankruptcy for the estate of said

Peter Masterson, pursuant to orders entered by this court in the matter of Peter Masterson, in bankruptcy No. 76053.

4. Your petitioner further represents that the said alleged bankrupt committed an act of bankruptcy in that it did heretofore within four (4) months of the filing of this petition, to wit, on or about December 15, 1941, while insolvent, pay to Walter N. Darby, as agent for the owner of the premises at 226 West Superior Street, Chicago, Illinois, a large sum of money on account of delinquent and past due rents on said premises with intent to prefer such agent and owners over the other creditors of said alleged bankrupt, the amount paid and the exact dates of payments not being known to your petitioner at this time, but all of which information is contained in the alleged bankrupt's books and records, which books and records are hereby incorporated herein and made a part of this petition by reference thereto, and examination of which will disclose all such information to the court.

5. Your petitioner further represents that the said alleged bankrupt committed an act of bankruptcy in that it did heretofore, to wit, within four months of the filing of this petition, commit divers acts of bankruptcy in that it did at divers times and while insolvent transfer portions of its property by making cash payments to certain of its creditors with intent to prefer such creditors over the other creditors of said alleged bankrupt, the amounts paid, the dates of payments, and the names of such creditors not being known to your petitioner at this time, but all of which [fol. 5] information is contained in the alleged bankrupt's books and records, which books and records are hereby incorporated herein and made a part of this petition by reference thereto, and examination of which will disclose all such information to the court.

Wherefore, your petitioner prays that service of this petition, with writ of subpoena, may be made upon said Cowing Pressure Relieving Joint Company, an unincorporated company or association, as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged by the court to be a bankrupt within the purview of said acts; and petitioner further prays that an order may be entered in this cause specifically referring the same to a referee in bankruptcy to the end that your petitioner

may be enabled to conduct an examination of the alleged bankrupt and its books and records relative to its business and affairs.

G. F. Albin, Petitioner, by Thomas S. McCabe, His Attorney and duly authorized agent.

Duly sworn to by Thomas S. McCabe. Jurat omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed March 20, 1942

Now comes Peter Masterson, not personally or individually but as Trustee under the Trust Agreement dated August 5, 1921 by and between John P. Cowing, Peter Masterson, Francis O'Shaughnessy and John P. O'Shaughnessy, sued herein as Cowing Pressure Relieving Joint Company, an unincorporated company or association, appears and answers the petition filed in the above court on the 9th day of February, 1942, praying that Cowing Pressure Relieving Joint Company, an unincorporated company or association, be adjudged a bankrupt, as follows:

1. Respondent denies that Cowing Pressure Relieving Joint Company is properly designated as an unincorporated company or association, and states that the proper designation of the alleged bankrupt is Peter Masterson, not personally or individually but as Trustee under the Trust Agreement dated August 5, 1921 by and between John P. Cowing, Peter Masterson, Francis O'Shaughnessy and John P. O'Shaughnessy.

2. Respondent admits the allegations of paragraph 2 of the petition, except the allegation that respondent is an unincorporated company or association.

3. Respondent denies that all of the creditors of the trust [fol. 7] sued herein as Cowing Pressure Relieving Joint Company are less than twelve in number, as alleged in the petition, and says that the following is a true list of the creditors thereof showing the names, addresses, amount owing to each, and the security, if any, held by each:

Creditor	Address	Amount	Security
Donald Masterson	1053 North Shore Avenue, Chicago, Illinois	$550.00	None
Peter Masterson	1053 North Shore Avenue, Chicago, Illinois	$19.11	None
Rose Wise Cowing	4743 North Wolcott Avenue, Chicago, Illinois	$4239.73	None
John Toman, County Collector	County Building, Chicago, Illinois	$363.35	None
Carter Harrison, Collector of Internal Revenue	Federal Building, Chicago, Illinois	Unknown	None
Rocky Mountain Contractor	Denver, Colorado	$5.00	None
G. F. Albin	c/o Thomas S. McCabe, 105 West Monroe Street, Chicago, Illinois	$2620.12	None
Offield Melhope, Scott & Pool	33 South Clark Street, Chicago, Illinois	$250.25	None
Thomas Hart Fisher	135 South LaSalle Street, Chicago, Illinois	Indeterminate and unknown	Books, documents and records of the Trustee, together with the sum of approximately $11,000.00 in cash
William Masterson	1053 North Shore Avenue, Chicago, Illinois	Approximately $200.00	None
[fol. 8]			
National Lead Company	900 West 18th Street, Chicago, Illinois	$1699.81	None
Walter N. Darby, Receiver appointed by the Superior Court of Cook County, case number 38S 10116	228 West Kinzie Street, Chicago, Illinois	$117.77	None
Mary Newberry, c/o Walter N. Darby	228 West Kinzie Street, Chicago, Illinois	$127.23	None
Chicago Towel & Supply Company	160 North Wells Street, Chicago, Illinois	$10.50	None
Commonwealth Edison Company	72 West Adams Street, Chicago, Illinois	$16.51	None
Chicago Blue Print Company	135 South LaSalle Street, Chicago, Illinois	$2.98	None
Prentice-Hall, Inc.	222 West Adams Street, Chicago, Illinois	$2.72	None
Walton Joplin Langer & Company	231 South LaSalle Street, Chicago, Illinois	$500.00	None
William H. McArthur	4400 West Parker Street, Chicago, Illinois	$1750.00	None
Henry J. & Charles Aaron	33 South Clark Street, Chicago, Illinois	Indeterminate	Attorneys' lien on sundry documents, money, etc.
Willard C. Walters	135 South LaSalle Street, Chicago, Illinois	Indeterminate	Attorney's lien on sundry documents, money, etc.
Charles E. Masterson	1053 North Shore Avenue, Chicago, Illinois	$4783.33	None

[fol. 9] 4. None of said creditors above named were employed by this respondent on the 9th day of February, 1942, the date on which said petition was filed.

5. None of said creditors is the owner of any interest in the aforesaid trust, except Rose Wise Cowing.

6. None of said creditors except Walter N. Derby, as Receiver appointed by the Superior Court of Cook County, Number 388 10116, and Mary Newberry, have received any benefit from the payments alleged by the petitioning creditor as an act of bankruptcy, but respondent denies that the act alleged as an act of bankruptcy was in fact an act of bankruptcy, and denies that the respondent is or was at the time of said payments insolvent.

7. None of said claims are fully secured, with the exception of the claim of Thomas Hart Fisher, who in fact is indebted to this respondent.

8. None of said creditors have received preferences, liens or transfers void under the Bankruptcy Act.

9. Further answering, respondent denies that G. F. Albin is a person entitled to file a petition herein as a petitioning creditor. Respondent states the fact to be that on July 17, 1941 a petition in bankruptcy was filed against Peter Masterson, individually; that on September 15, 1941 Peter Masterson was adjudged a bankrupt, and on February 7, 1942, pursuant to orders by the Referee in Bankruptcy, the claim of Peter Masterson personally in the sum of $2,620.12 against [fol. 10] Peter Masterson, as Trustee aforesaid, sued herein as Cowing Pressure Relieving Joint Company, was purchased by G. F. Albin, for the sum of $925.00, subject to all liens and incumbrances. Said claim in fact on or about January 15, 1935 was assigned by the said Peter Masterson, individually, to Rose Wise Cowing, also known as Mrs. John P. Cowing, as security for the indebtedness of Peter Masterson, individually, to the said Rose Wise Cowing, and is subject to said assignment to Rose Wise Cowing and also is subject and subordinate to all other claims against the said trust, with the exception of the claim of the said Rose Wise Cowing for the sum of $4,239.73 scheduled above, which said claim purchased by G. F. Albin and said claim of Rose Wise Cowing were not to be paid until all other claims against the trust were fully paid for the reason that

Rose Wise Cowing and Peter Masterson were the sole beneficiaries of the said trust, (the interest of Peter Masterson in the said trust also having been purchased by G. F. Albin at the bankruptcy sale on February 7, 1942). On October 3, 1940 respondent filed a petition in the Superior Court of Cook County, Illinois, in case Number 38S 18698, against Thomas Hart Fisher, alleging that the said Thomas Hart Fisher held a sum of money in excess of $11,000.00 constituting the property of the said trust, and also held certain books, documents, records and instruments of the trust, all of which he refused to deliver to respondent. Thereafter the said petition, the answer of said Thomas Hart Fisher, and the reply of respondent thereto, were referred to John J. Kelly, one of the Masters in Chancery of the Superior Court. In excess of twenty five hearings on the subject matter of said petition, answer and reply have been held before the said Master in Chancery, and a rule to close proofs in said proceeding on February 16, 1942 was entered on January 27, 1942, and thereafter on motion of Thomas Hart Fisher was continued to February 23, 1942. On February 21, 1942, without notice to respondent or any person interested in this proceeding, except said Thomas Hart Fisher, the petitioning creditor herein obtained an order restraining further proceedings in said superior court case. On or about December 5, 1941 the said G. F. Albin, through Thomas S. McCabe, his attorney, attempted to purchase the claim of W. N. Darby, as Receiver appointed in Superior Court case Number 38S 10116, against the petitioner, for the full face amount of said claim, but the Superior Court of Cook County denied leave to its Receiver to sell said claim for the reason that Thomas S. McCabe refused to disclose the name of the person who actually desired to purchase the claim or the purpose for which he desired to purchase it. Respondent further states it is his opinion that the true owner of the said claim on which this petition in bankruptcy has been filed is Thomas Hart Fisher, and that said claim was purchased, as aforesaid, for the sole purpose of instituting this proceeding and defeating the recovery by respondent in the Superior Court of Cook County, Illinois of the sum due the respondent from the said Thomas Hart Fisher. Further answering, respondent states that the said Thomas Hart Fisher, being indebted to petitioner for a sum of money substantially in excess of $2,620.12, the

claim on which said petition purports to be predicated in [fol. 12] fact is non-existent.

10. Respondent denies that the trust sued herein as Cowing Pressure Relieving Joint Company intended to prefer any of its creditors, as alleged in the petition.

11. Respondent further states that the allegations of acts of bankruptcy in all respects are vague, indefinite and insufficient to set forth the proper grounds for the adjudication of this respondent as a bankrupt.

12. Respondent denies that any transfers were made with intent to prefer any creditor, and denies each and every other allegation contained in the petition.

Wherefore, respondent prays that a hearing may be had on said petition and this answer, and that the issues presented thereby may be determined by the Court, and that the petition to have Cowing Pressure Relieving Joint Company adjudged a bankrupt may be dismissed.

Peter Masterson (s), Trustee under Four-Party Agreement dated August 5, 1921, etc., sued herein as Cowing Pressure Relieving Joint Company. Henry J. Charles Aaron, Charles Aaron, Sidney J. Hess, Jr., Willard C. Walters, Attorneys for alleged bankrupt.

Duly sworn to by Peter Masterson. Jurat omitted in printing.

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR RESTRAINING ORDER—Filed February 21, 1942

Now comes G. F. Albin and respectfully represents unto your Honor that he is the petitioning creditor, having heretofore filed an involuntary petition in bankruptcy praying among other and sundry relief that Cowing Pressure Relieving Joint Company be adjudicated a bankrupt.

Your petitioner further represents that said alleged bankrupt has virtually ceased to do business and to discharge those functions for which it was created; that with the ex-

ception of some furniture, fixtures and machinery valued at approximately several hundred dollars, and some dubious accounts receivable, the only other asset it has is in the nature of a certain claim in an amount which it alleges is in the sum of from approximately $9,000 to $11,000. Peter Masterson is trustee of said alleged bankrupt.

Your petitioner further represents that the alleged debtor is Thomas Hart Fisher of Chicago, Illinois, and that heretofore in a certain proceeding entitled "*Felix B. Kilbride, as administrator with the will annexed of the Estate of Michael Masterson, deceased,* Plaintiff, vs. *Peter Masterson, et al.,* Defendants, No. 34S 18698 in the Superior Court of Cook County," there has been a petition filed by the alleged [fol. 14] bankrupt herein seeking to recover said funds; that in said proceedings the said Thomas Hart Fisher filed certain counterclaims alleging that instead of being indebted to the said debtor in the various sums claimed that the alleged bankrupt is indebted to said Fisher after all just deductions and credits, in a sum which as your petitioner is informed will exceed approximately $1,000.

Your petitioner further represents that this said matter has been referred and is pending before Master John J. Kelly, a master in chancery of the Superior Court of Cook County, and that there has been a hearing scheduled to take place on Monday, February 23, at the hour of two o'clock P. M.; that unless the parties involved in said litigation and said hearing are restrained and enjoined from further proceeding, there is grave and imminent danger that this principal asset of the debtor may be dissipated and wholly lost to this estate.

Your petitioner further states that it is to the best interest of the creditors of this estate that when an adjudication has been entered in these proceedings and a trustee in bankruptcy has been duly elected by the creditors that the said trustee should investigate all the facts pertaining to this subject matter and that this Court should have jurisdiction in marshalling and collecting the said asset for the benefit of all the creditors; that the said alleged bankrupt is indebted to various creditors in an amount, as your petitioner is informed and therefore charges the fact to be, in excess of $15,000, and that if this asset is lost to this estate there will be irretrievable damage incurred to all the creditors, including your petitioner.

Your petitioner further represents that in addition to the aforementioned suit, the National Lead Company of [fol. 15] Chicago, Illinois, has instituted an action in The Municipal Court of Chicago against the bankrupt herein, in which suit the National Lead Company alleges there is due to it the sum of approximately $2,500. Your petitioner therefore states that said suit should likewise be restrained until the further order of this Court.

Wherefore, your petitioner prays that an order may be entered restraining and enjoining Cowing Pressure Relieving Joint Company, the alleged bankrupt, its agents and attorneys, Peter Masterson, Trustee, Thomas Hart Fisher; and National Lead Company, their agents and attorneys, from in any way prosecuting any and all suits, at law or in equity, against or by the alleged bankrupt herein, Cowing Pressure Relieving Joint Company, until the further order of this Court.

And your petitioner will ever pray.

G. F. Albin.

Duly sworn to by G. F. Albin. Jurat omitted in printing.

[fol. 16] IN UNITED STATES DISTRICT COURT

[Title omitted]

RESTRAINING ORDER—February 21, 1942

This matter coming on to be heard upon the petition and motion of G. F. Albin, petitioning creditor herein,

It Is Therefore Ordered that Cowing Pressure Relieving Joint Company, the alleged bankrupt, its agents and attorneys, Peter Masterson, Trustee, Thomas Hart Fisher, and National Lead Company, its agents and attorneys, be and they each are hereby restrained and enjoined from the prosecution of any and all claims against the alleged bankrupt herein until the further order of this Court; and that the said Peter Masterson and Thomas Hart Fisher and the alleged bankrupt be and they are hereby specifically enjoined and restrained from any and all further proceedings now pending in the Superior Court of Cook County in the case entitled "Felix B. Kilbride, as administrator with the

will annexed of the Estate of Michael Masterson, deceased, Plaintiff, vs. Peter Masterson, et al., Defendants, No. 34S 18698 in the Superior Court of Cook County," until the further order of this Court.

Entet:

Igoe, Judge.

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO SET ASIDE RESTRAINING ORDER—Filed March 20, 1942

To the Honorable Michael L. Igoe, one of the Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division:

Now comes Peter Masterson, Trustee under the trust agreement dated August 5, 1921, by and between John P. Cowing, Peter Masterson, Francis O'Shaughnessy and John P. O'Shaughnessy, sued herein as Cowing Pressure Relieving Joint Company, an unincorporated company or association, an alleged bankrupt, and alleges:

1. That heretofore, on February 9, 1942, G. F. Albin filed his petition herein to have Cowing Pressure Relieving Joint Company, an unincorporated company or association, adjudged a bankrupt, and alleged that the total number of creditors of said Cowing Pressure Relieving Joint Company was less than twelve (12), and further alleged certain acts of bankruptcy.

2. That service of the subpoena in bankruptcy was not made upon this petitioner until March 14, 1942; that petitioner has filed an answer in this proceeding on behalf of [fol. 18] Cowing Pressure Relieving Joint Company, an unincorporated company or association, denying that said company is insolvent, alleging that the trust sued herein as Cowing Pressure Relieving Joint Company has more than twelve (12) creditors, and further alleging that the petition in bankruptcy was improperly filed and should be dismissed.

3. That on or about October 3, 1940, petitioner, as trustee under the said trust agreement dated August 5, 1921, filed a petition in the Superior Court of Cook County, Illinois,

in case number 34S 18698, alleging that Thomas Hart Fisher, an attorney at law of Chicago, Illinois, held in his possession moneys belonging to the said trust in a sum in excess of $11,398.49, and also held property of the trust, consisting of books, records, documents and other instruments which the said Fisher wrongfully refused to deliver to this petitioner; that issue was joined in said proceeding, and the cause thereafter was referred to John J. Kelly, one of the Masters in Chancery of the Superior Court of Cook County, Illinois; that more than twenty-five hearings on the issues of said petition, the answer thereto and the reply of this petitioner, have been held before the said John J. Kelly, Master in Chancery, and that an order was entered by the said Master in Chancery on January 27, 1942 directing that all parties to said proceeding pending before him should close proofs on February 16, 1942; that the rule to close proofs before the said John J. Kelly on February 16, 1942, was, on motion of the said Thomas Hart Fisher, continued to February 23, 1942.

4. That a petition in bankruptcy against Peter Masterson individually heretofore was filed in this Court on July 17, 1941; that the said Peter Masterson individually was [fol. 19] adjudged bankrupt on September 15, 1941, and that pursuant to orders entered in said cause, G. F. Albin, the sole petitioning creditor in this proceeding, on February 7, 1942, purchased from John H. Chatz, trustee in bankruptcy for Peter Masterson individually, for the sum of $925.00, the claim of Peter Masterson individually against the trust, sued herein as Cowing Pressure Relieving Joint Company, in the sum of $2620.12, and also purchased the beneficial interest of Peter Masterson in said trust; that said claim purchased by G. F. Albin from John H. Chatz, trustee in bankruptcy, is subordinate to the claims of other creditors of the said trust, sued herein as Cowing Pressure Relieving Joint Company, and is subject to a lien owned by Rose Wise Cowing, and was purchased by the said G. F. Albin subject to all liens and encumbrances.

5. That prior to the institution of this proceeding and on or about the 5th day of December, 1941, the petitioning creditor herein, G. F. Albin, attempted to purchase, for the full face amount thereof, the claim of Walter N. Darby as receiver in Superior Court case No. 38S 10116, entitled Pauline Newberry vs. Abraham Siegel, against this peti-

tioner as trustee, but the Superior Court of Cook County directed the said receiver not to sell the said claim to G. F. Albin upon the refusal of Thomas S. McCabe, attorney for G. F. Albin, to disclose the identity of the real purchaser of the claim or the reason why he desired to purchase the claim.

6. That on February 21, 1942, G. F. Albin filed his petition herein, praying that the prosecution of the proceeding against Thomas Hart Fisher in the Superior Court of Cook County, Illinois, should be restrained until further [fol. 20] order of this Court, and that on said date an order was entered herein, restraining petitioner and others from proceeding in said cause, and that said order was obtained without notice to petitioner or any other person interested in said Superior Court proceeding with the exception of the said Thomas Hart Fisher.

7. That the so-called counterclaim of Thomas Hart Fisher against this petitioner, set forth in the petition for the restraining order entered herein on February 21, 1942, is without merit; that a substantial portion of the assets of the said trust, sued herein as Cowing Pressure Relieving Joint Company, consists of the claim against Thomas Hart Fisher; that in the opinion of this petitioner there will be no question of the solvency of the said trust if recovery is made in said proceeding, and in the opinion of this petitioner it is to the best interest of petitioner and all of the creditors of the said trust that said proceeding in the Superior Court of Cook County, Illinois, be consummated without delay; petitioner denies the allegation of the said petition for the restraining order that it is to the best interest of the trust estate to restrain the prosecution of said Superior Court proceedings.

8. That it is the opinion of petitioner that this bankruptcy proceeding has been instituted for the sole purpose of defeating the claim of petitioner as trustee, sued herein as Cowing Pressure Relieving Joint Company, against Thomas Hart Fisher, and that consistent with said purpose, the petitioning creditor herein forthwith upon the acquisition of his claim from the trustee in bankruptcy for Peter Masterson individually, filed this proceeding, and without notice to this petitioner, caused the restraining [fol. 21] order herein to be entered; that notwithstanding

the motive for the institution of this proceeding, it is to the best interest of the bankrupt estate that the proceeding pending before John J. Kelly, Master in Chancery, be completed forthwith and if the alleged bankrupt herein be adjudged a bankrupt, the recovery in said proceeding will inure to the benefit of the bankrupt estate.

Wherefore, petitioner respectfully prays that an order be entered herein, dissolving, vacating and setting aside the restraining order entered in this proceeding on February 21, 1942, and that the Court grant to petitioner such other relief as to the Court may seem proper.

Peter Masterson, Trustee under Four Party Trust Agreement dated August 5, 1921, etc., sued herein as Cowing Pressure Relieving Joint Company.

Duly sworn to by Peter Masterson. Jurat omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS PETITION TO VACATE RESTRAINING ORDER —Filed March 26, 1942

To the Honorable Michael L. Igoe, One of the Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division:

Now comes G. F. Albin, by Thomas S. McCabe, his attorney, and moves this court that an order may be entered dismissing the petition heretofore filed by Peter Masterson, Trustee, praying that an order may be entered dissolving, vacating and setting aside the restraining order entered in these proceedings on February 21, 1942; and in support of said motion, this respondent represents that:

1. In accordance with Chapter *III*, Section *XI* of the Bankruptcy Act as amended in 1938, it is provided that:

"A suit against a debtor pending at the day of the bankruptcy petition and founded upon a claim dischargeable in

bankruptcy; *shall be stayed until the debtor's adjudication or dismissal of the petition. Upon the adjudication, such suit may be further stayed until his discharge has been determined by the court after hearing, or by his written waiver or loss of his right to a discharge; or in the case of* [fol. 23] *a corporation by its* failure to apply for a discharge within the time specified under the Act."

That the said restraining order complained of, when entered, merely affirmed the law as it then existed; and that the litigation described in said petition could not have proceeded further until this court determined the adjudication of the bankrupt herein.

2. That; on the face of the said petition, it is admitted that in said litigation, which has heretofore been enjoined from proceeding further, Thomas Hart Fisher, against whom it is sought to recover an account for certain sums of money, has instituted in said proceedings a counterclaim; that, from an examination of said pleadings in said proceedings, it appears that said Thomas Hart Fisher claims that the alleged bankrupt herein is indebted to him in a far greater sum than that which the alleged bankrupt claims is due it from the said Thomas Hart Fisher. Said claim against this bankrupt is a claim dischargeable in bankruptcy.

3. That, at this time there has been an answer filed to the involuntary petition for adjudication herein and this cause is now at issue. That your petitioner, as a petitioning creditor, is ready, willing and able to forthwith proceed before this court, or before such Referee as to whom this court may refer, and try these issues.

Wherefore, by reason of the foregoing, it appearing that said petition was prematurely filed, this respondent prays that the said petition be dismissed; and this respondent will ever pray.

G. F. Albin, by Thomas S. McCabe, His Attorney.

Pennish & Rashbaum, 110 S. Dearborn St.

[fol. 24] *Duly sworn to by Thomas S. McCabe. Jurat omitted in printing.*

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER VACATING RESTRAINING ORDER—March 26, 1942

This cause coming on to be heard on the verified petition of Peter Masterson, Trustee under a four party trust agreement dated August 5, 1921, by and between John P. Cowing, Francis O'Shaughnessy and John P. O'Shaughnessy, sued herein as Cowing Pressure Relieving Joint Company, an unincorporated company or association, an alleged bankrupt, for the entry of an Order vacating and setting aside the Order entered herein on February 21, 1942, restraining the said Peter Masterson, as Trustee aforesaid, from proceeding with the prosecution of a cause pending in the Superior Court of Cook County, Illinois, case number 34S 18698 against Thomas Hart Fisher, and it appearing to the Court that said restraining order was entered without notice to Peter Masterson, as Trustee aforesaid, and that due notice of the presentation of this motion has been served upon all parties entitled to notice, and the Court having examined said petition, and being fully advised as to the facts, and having jurisdiction of the parties hereto and the subject matter hereof:

It is Ordered that the order entered herein on February [fol. 26] 21, 1942, restraining Peter Masterson, as Trustee, his agents, attorneys and representatives and others from proceeding in the prosecution of the proceeding pending against Thomas Hart Fisher in the Superior Court of Cook County, case number 34S 18698, be and the same is hereby vacated and set aside, and that the said Peter Masterson, as Trustee aforesaid, his agents, attorneys and representatives, and others interested in said proceeding, be and they are hereby authorized to proceed in the same manner as if said order, entered herein on February 21, 1942, had not been entered.

Enter:

Barnes, District Judge.

March 26, 1942.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed March 31, 1942

To Willard C. Walters, 135 South LaSalle Street, Chicago, Illinois; Henry J. and Charles Aaron, 33 South Clark Street, Chicago, Illinois:

Notice is hereby given that G. F. Albin, petitioning creditor in the above entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from the interlocutory order or decree entered in this cause by the Honorable John P. Barnes, Judge of this Court, on the 26th day of March, 1942, which said order or decree dissolved and vacated the order heretofore entered in this cause on February 21, 1942 restraining and enjoining the alleged bankrupt and others from the prosecution of any and all claims against the alleged bankrupt until the further order of this Court, and specifically enjoining and restraining Peter Masterson and Thomas Hart Fisher and the alleged bankrupt from any and all further proceedings now pending in the Superior Court of Cook County, Illinois, in the case entitled "Felix B. Kilbride, as Administrator with the will annexed of the Estate of Michael Masterson, deceased, Plaintiff, v. Peter Masterson, et al., defendants, No. 34S 18698 in the Superior Court of Cook County," until further order of this court.

G. F. Albin, Petitioning Creditor, by Thomas S. McCabe, His Attorney. Thos. S. McCabe, 105 West Monroe Street, Room 1004, Chicago, Illinois, Telephone: STAte 2682.

[fol. 28] IN THE DISTRICT COURT OF THE UNITED STATES

CERTIFICATE OF MAILING NOTICE OF APPEAL

I, Hoyt King, Clerk of the United States District Court, for the Northern District of Illinois, Eastern Division, keeper of the Seal and Records of said Court, do hereby certify that on the 1st day of April, 1942, in accordance with Rule 73 (b) of the Rules of Civil Procedure for District

Courts of the United States, I did cause to be mailed a copy of the foregoing Notice of Appeal to the following attorneys of record:

Willard C. Walters, 135 South LaSalle St., Chicago, Illinois.

Henry J. & Charles Aaron, 33 South Clark Street, Chicago, Illinois.

Hoyt King, Clerk. (Seal.)

[fol. 29] Bond on appeal for $250, filed March 31, 1942, omitted in printing.

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

STATEMENT OF POINTS—Filed April 1, 1942

Now comes G. F. Albin, Petitioning Creditor, plaintiff-appellant in the above entitled cause, by Thos. S. McCabe, his attorney, and having designated for inclusion in the designation of contents of record on appeal the complete record, proceedings and evidence in this cause in this Court, and having thereby reserved the right to present any and all matters and issues on appeal in said appeal, does nevertheless herewith file the following statements of points upon which he will principally rely in the prosecution of said appeal herein taken:

1. The court erred in dissolving and vacating the restraining order entered in this cause on February 21, 1942.

G. F. Albin, Petitioning Creditor, Plaintiff-Appellant, by Thomas S. McCabe, His Attorney. Thos. S. McCabe, Attorney for Plaintiff-Appellant, 105 W. Monroe Street, Room 1004, Chicago, Illinois.

Received a copy of the foregoing "Statement of Points" this 30 day of March, A. D. 1942.

Henry J. — Charles Aaron. Willard C. Walters.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

DESIGNATION OF PORTIONS OF THE RECORD—Filed April 1, 1942

Now comes G. F. Albin, as petitioning creditor herein, plaintiff-appellant, by Thos. S. McCabe, his attorney, and hereby designates the following portions of the record to be contained in the record on appeal:

1. Placita.

2. Petition by creditor for involuntary adjudication, filed on February 9, 1942.

3. Answer of Peter Masterson, not personally or individually but as Trustee under the Trust Agreement dated August 5, 1921, sued herein as Cowing Pressure Relieving Joint Company, an unincorporated company or association, filed on March 20, 1942.

4. Petition of G. F. Albin for restraining order, filed on February 21, 1942.

5. Order restraining and enjoining prosecution of any and all claims against the alleged bankrupt, entered on February 21, 1942.

6. Petition of Peter Masterson, Trustee, for a rule to dissolve and vacate restraining order, filed on Friday, March 20, 1942.

7. Motion of G. F. Albin to dismiss petition of Peter Masterson, Trustee, for a rule to dissolve and vacate restraining order, filed on March 26, 1942.

8. Order or decree dissolving and vacating restraining order, entered on March 26, 1942.

9. Notice of appeal filed the 31st day of March, 1942.

10. Bond on Appeal.

[fol. 32] 11. Statement of points filed by plaintiff-appellant.

12. This designation of portions of the record.

G. F. Albin, Petitioner Creditor, Plaintiff-Appellant, by Thomas S. McCabe, His Attorney.

Thos. S. McCabe, Attorney for Plaintiff-Appellant, 105 West Monroe Street, Room 1004, Chicago, Illinois, Telephone: STAte 2682.

Received a copy of the above and foregoing "Designation of Portions of the Record" this 1st day of April, 1942.

Willard C. Walters, Charles Aaron, Sidney J. Hess, Jr., Henry J.—Charles Aaron.

[fol. 33] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPLICATION FOR RESTRAINING ORDER—Filed February 21, 1942

To:

Thomas Hart Fisher, 135 South LaSalle Street, Chicago, Illinois

Peter Masterson, Trustee, and Cowing Pressure Relieving Joint Company, 226 West Superior Street, Chicago, Illinois

You and each of you please take notice that on Saturday, February 21, 1942, at the hour of ten o'clock A. M. or as soon thereafter as court convenes and counsel can be heard, the undersigned will appear before Judge John P. Barnes in the courtroom usually occupied by him in the Federal Building, Chicago, Illinois, or before such other judge as shall be sitting and hearing matters in his absence, and shall then and there present the petition of G. F. Albin, the petitioning creditor herein, praying that National Lead Company, Thomas Hart Fisher, Peter Masterson, Trustee, and Cowing Pressure Relieving Joint Company the alleged bankrupt, be and each of them be restrained and enjoined from prosecuting any and all causes of action either by or against the alleged bankrupt until the further order of this Court, at which time and place you may appear if you so desire.

Thomas S. McCabe, Attorney for petitioning creditor, 105 West Monroe Street, Room 1005, Chicago, Illinois, Telephone: STAte 2682.

Received copy of the above notice this 20th day of February, A. D. 1942. Thomas Hart Fisher, M. E.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PETITION TO VACATE RESTRAINING ORDER—Filed March 20, 1942

To Thomas S. McCabe, 105 West Monroe Street, Chicago, Illinois, and Thomas Hart Fisher, 135 South La Salle Street, Chicago, Illinois:

You are hereby notified that on Friday, March 20, 1942, at the opening of court in the forenoon or as soon thereafter as counsel can be heard, we shall appear before the Honorable Michael L. Igoe, one of the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division, in the room usually occupied by him as a courtroom in the United States Courthouse, or in his absence before such other Judge as may be hearing motions, and shall then and there present the petition of Peter Masterson Trustee under trust agreement dated August 5, 1921, by and between John P. Cowing, Peter Masterson, Francis O'Shaughnessy and John P. O'Shaughnessy, and shall ask that an order be entered dissolving the restraining order entered in this proceeding on February 21, 1942, in accordance with the prayer of said petition, a copy of which is herewith served upon you, at which time and place you may appear as you see fit.

Dated, Chicago, Illinois, March 19, 1942.

Thomas Hart Fisher—M. E. Thos. A. McCabe, by Harry W. Meneely.

Received a copy of the foregoing notice and of the petition therein referred to this 19th day of March, 1942.

Thomas Hart Fisher—M. E., Thos. A. McCabe, By Harry W. Meneely.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO FILE PETITION TO VACATE RESTRAINING ORDER AND SETTING PETITION FOR HEARING—March 20, 1942

On motion of Attorneys for Peter Masterson as Trustee etc. It is Ordered that leave be and the same is hereby given

him to file instanter a Petition and hearing be and the same is hereby given Petitioning Creditors to file an answer thereto within 5 days from this date and It is Ordered that the hearing on said petition and answer be and the same is hereby set for March 26th, 1942 before Judge Igoe.

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

DESIGNATION BY PETER MASTERSON, TRUSTEE UNDER TRUST AGREEMENT DATED AUGUST 5, 1921 BY AND BETWEEN JOHN P. COWING, ET AL. (APPELLEE), OF ADDITIONAL PORTIONS OF THE TRIAL COURT RECORD—Filed April 10, 1942

The Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, hereby is directed to include in the authenticated trial court record in the above entitled cause the following documents, in addition to the documents and matters set forth and described in the designation heretofore filed by G. F. Albin, Plaintiff-Appellant:

1. Notice filed by G. F. Albin on February 21, 1942.

2. Notice filed by Peter Masterson, as Trustee, etc., on March 20, 1942.

3. Order entered March 20, 1942 granting leave to file petition and setting hearing thereon, March 26, 1942.

4. This designation of additional portions of the trial court record.

5. Certificate of Clerk that documents are true and correct copies of the documents and proceedings described.

Willard C. Walters, 135 South LaSalle Street, Chicago, Illinois; Charles Aaron, Sidney J. Hess, Jr., Henry J. & Charles Aaron, 33 South Clark Street, Chicago, Illinois, Attorneys for Peter Masterson, as Trustee aforesaid, Appellee.

[fol. 37] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 38] [Caption omitted]

[fol. 39] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before Hon. J. Earl Major, Circuit Judge; Hon. Otto Kerner, Circuit Judge; Hon. Sherman Minton, Circuit Judge.

In the Matter of COWING PRESSURE RELIEVING JOINT COMPANY, ETC., Alleged Bankrupt

7982

G. F. ALBIN, Appellant,

vs.

COWING PRESSURE RELIEVING JOINT COMPANY, etc., et al., Appellees

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

ORDER DENYING MOTION FOR SUPERSEDEAS AND DISMISSING APPEAL—April 23, 1942

It is ordered by the Court that the motion of counsel for appellant G. F. Albin, for an order of supersedeas be, and the same is hereby, denied.

It is further ordered by the Court that this appeal be, and the same is hereby, dismissed, with costs, for lack of jurisdiction.

[fol. 40] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

NOTICE OF APPLICATION TO STAY MANDATE AND FOR A STAY INJUNCTION—Filed May 28, 1942

To Henry J. & Charles Aaron and Sidney J. Hess, 33 South Clark Street; Willard C. Walters, 135 South LaSalle Street, Chicago:

Please take notice that on Friday, May 29, 1942, I will file in the United States Circuit Court of Appeals for the

Seventh Circuit, in the above entitled appeal, on behalf of the appellant, Application to Stay Mandate and to Grant Stay Injunction Staying Order Dissolving and Vacating the Restraining Order filed on March 26, 1942 in the District Court, together with form of Stay Order and Suggestions in Support of said application, a copy of which is herewith served upon you.

Please take notice that on the same date I shall likewise file a Praecipe for Record with the Clerk of said Court, a copy of which is likewise herewith served upon you.

Thomas S. McCabe, Attorney for Appellant.

[fol. 41] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

APPLICATION TO STAY MANDATE AND TO GRANT STAY INJUNCTION STAYING ORDER DISSOLVING AND VACATING THE RESTRAINING ORDER FILED ON MARCH 26, 1942 IN THE DISTRICT COURT—Filed May 28, 1942

Now comes G. F. Albin, petitioning creditor herein, appellant, by Thomas S. McCabe his attorney, and moves the Court to stay the issuance of the mandate herein and to grant a stay injunction staying the order dissolving and vacating the restraining order filed on March 26, 1942 in the District Court of the United States for the Northern District of Illinois, Eastern Division, in cause No. 77464 in bankruptcy until the Petition for Certiorari to the United States Supreme Court has been acted upon and until final disposition of the case by the Supreme Court, and in support of said motion and application respectfully shows the Court as follows:

1. Appellant has filed in this cause a Praecipe for Record and intends to file a Petition for Certiorari to the Supreme Court of the United States seeking to review and reverse the order of this Court entered on April 23, 1942 dismissing [fol. 42] this appeal for lack of jurisdiction.

2. As set forth in the appellant's Petition for Certiorari this case is one in which probable grounds exist for the issuance of such writ.

3. The granting of the stay orders prayed for will protect all parties and produce injury to none, and will preserve the assets of the alleged bankrupt until the Petition for Certiorari can be heard and decided.

4. The entire relief sought by this appeal will be denied to the appellant unless this Court shall stay the order dissolving and vacating the restraining order filed on March 26, 1942 in the District Court until the Petition for Certiorari to the United States Supreme Court has been acted upon and until final disposition of the case by the Supreme Court. The failure to grant the stay order prayed for will or may cause irreparable injury to the assets of the alleged bankrupt pending the appeal to the Supreme Court. The original restraining order was entered by the Honorable Michael L. Igoe on February 21, 1942 under the mandatory provisions of Section XI of the Bankruptcy Act of 1938. This Court has not *denied* this appeal upon the merits but has *dismissed* the appeal "for lack of jurisdiction." Since the sole purpose of the appeal is to secure the benefits of the original restraining order entered by Judge Igoe on February 21, 1942, and since the appellant [fol. 43] has been denied the benefit of a decision on this appeal upon the merits, the appellant is properly entitled to a stay order staying the mandate and staying the order dissolving and vacating the restraining order entered by Judge Igoe on February 21, 1942 until action and final disposition of this case by the Supreme Court of the United States upon the Petition for Certiorari aforesaid.

Wherefore, appellant prays this Court to stay the issuance of the mandate herein and to grant a stay injunction staying the order dissolving and vacating the restraining order entered by Judge Igoe on February 21, 1942 in the District Court of the United States for the Northern District of Illinois as hereinabove set forth.

Thomas S. McCabe, Attorney for Appellant.

[fol. 44] In United States Circuit Court of Appeals

[Title omitted]

Suggestions in Support of Motion for Stay Order—Filed May 28, 1942

Section 8 (d) of the Act of February 13, 1925 (28 U. S. C. A. Sec. 350) provides that in any case subject to review

by the Supreme Court on a writ of certiorari, execution and enforcement of the judgment or decree from which the appeal is taken may be stayed for a reasonable time to enable the appellant to apply for and to obtain a writ of certiorari from the Supreme Court. The language of the statute is as follows:

"In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court."

Pursuant to a recommendation of the Judicial Conference (Act of September 14, 1922, Chapter 306, § 2, 28 U. S. C. A. § 218) a number of the Circuit Courts of Appeals have adopted a practice of staying the issuance of the mandate for thirty days on application of the appellant, the stay to continue until the Supreme Court has finally disposed of [fol. 45] the case, provided that, within the thirty-day period, the petitioner files proof that he has filed his petition for certiorari in the Supreme Court and has served the respondent therewith.

Pursuant to the foregoing the Circuit Courts of Appeals may grant a stay injunction pending Supreme Court review upon Petition for Certiorari where the decree to be reviewed is one refusing or vacating a restraining order or temporary injunction in the District Court, as in this case.

The leading case is *Hovey* v. *McDonald*, 109 U. S. 150. In that case it was specifically held that the court from which the appeal to the Supreme Court was taken had the power "to order a continuance of the *status quo* until a decision should be made by the appellate court, or until that court should order the contrary"; and the Supreme Court quoted from Rule 93 of the Supreme Court adopted in 1898, providing that when an appeal is taken in an equity suit from a decree granting or dissolving an injunction the court may "make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party." Rule 93 of

the Supreme Court has now been superseded by Rule 38, paragraph 6, to the same effect. The court said (page 161):

"This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the decree as rendered."

This case has been cited in many subsequent decisions. For example, in *Merrimack River Savings Bank* v. *Clay* [fol. 46] *Center*, 219 U. S. 527, the Supreme Court specifically held that "Obviously this (right to a stay order) may include *a continuance of an injunction which would be otherwise vacated.*" To the same effect see:

Cotting v. *Kansas City Stockyards Co.*, 82 Fed. 850 (affirmed 183 U. S. 79);

Western Union Telegraph Co. v. *Wright*, 168 Fed. 558;

Cumberland Tel. & Tel. Co. v. *Louisiana Public Service Com.*, 260 U. S. 212;

Virginia R. R. Co. v. *U. S.*, 272 U. S. 658;

Merchants' Warehouse Co. v. *U. S.*, 283 U. S. 501; and

Champlin Refining Co. v. *Corporation Com.*, 286 U. S. 210.

In the case of *Western Union Telegraph Co.* v. *Wright*, 168 Fed. 558, above cited, the court quoted from the *Slaughter-house cases*, 10 Wall. 273, and *Hovey* v. *McDonald*, 109 U. S. 150, to the effect that where the lower court has dissolved a temporary injunction the appellant is entitled to a stay order pending an appeal to the Circuit Court of Appeals or to the Supreme Court. This is precisely the situation in the case at bar.

The foregoing cases all hold that "the plain purpose of the (stay) order * * * is to preserve the subject matter of the litigation until the rights of the complainant can be heard and decided."

Applying the foregoing rules to the present motion, it amply appears that the granting of the stay order as prayed for will protect all parties and produce injury to none. The effect of the entry of the stay order as prayed will be to preserve the assets of the alleged bankrupt until the Petition for Certiorari can be heard and decided. Since the entire relief sought by the appeal to the Supreme Court will be denied to the appellant unless this Court shall stay

[fol. 47] the order dissolving and vacating the restraining order in the District Court until the Supreme Court shall act upon and dispose of the Petition for Certiorari, the failure to grant the stay order prayed for will deprive the appellant of the very relief which he seeks and will cause irreparable injury to the estate of the alleged bankrupt if the suits against the alleged bankrupt to be stayed in the state courts be permitted to proceed to judgment during the pendency of the Petition for Certiorari before the Supreme Court.

Appellant particularly points out that this Court has not denied this appeal *upon its merits* but has dismissed the appeal "*for lack of jurisdiction.*" This is the basis of the Petition for Certiorari to the Supreme Court. It is earnestly submitted that a stay order should particularly be granted where, as in this case, the appellant has had no ruling of the Circuit Court of Appeals upon the merits of the order or decree appealed from.

It is also pointed out that Judge Igoe entered the original restraining order in the District Court on February 21, 1942 and that Judge Barnes dissolved the same restraining order, so that even in the trial court the District Court judges are divided as to whether the relief prayed for should or should not be granted.

Since no party to this proceeding can possibly be injured by the issuance of the stay order, but on the contrary the rights of the alleged bankrupt and all creditors claiming an interest in the assets of the alleged bankrupt's estate [fol. 48] will be fully protected and preserved by the issuance of such order, it is earnestly submitted that the stay order prayed for should be granted.

The form of the suggested order submitted with the application for a stay is drawn from the original restraining order entered by Judge Igoe on February 21, 1942, and follows the issuance of similar orders in other cases in the Circuit Courts of Appeals and in the Supreme Court of the United States.

Respectfully submitted,

Thomas S. McCabe, Attorney for Appellant.

[fol. 49] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PROPOSED ORDER

The application for a stay injunction staying the order dissolving and vacating the restraining order entered on March 26, 1942 in the District Court of the United States for the Northern District of Illinois, Eastern Division, pending the disposal of this cause on the Petition for Certiorari to the Supreme Court of the United States is granted.

It is therefore ordered that the alleged bankrupt, Cowing Pressure Relieving Joint Company, an unincorporated company or association, its agents and attorneys, Peter Masterson, Trustee, Thomas Hart Fisher, National Lead Company, and all other creditors of said alleged bankrupt be, and they each are hereby restrained and enjoined from the prosecution of any and all claims against the alleged bankrupt; and said Peter Masterson and Thomas Hart Fisher and the alleged bankrupt be and they are hereby specifically restrained and enjoined from further proceeding with the action now pending in the Superior Court of [fol. 50] Cook County, Illinois, in the case entitled "*Felix B. Kilbride as Administrator with the Will Annexed of the Estate of Michael Masterson, Deceased*, vs. *Peter Masterson, et al.*, cause No. 34S 18698" until the further order of this Court.

Per: —— ——, Judge of the United States Circuit Court of Appeals for the Seventh Circuit.

Dated: —— —, 1942.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING APPLICATION FOR STAY OF MANDATE AND FOR A STAY INJUNCTION—June 15, 1942

It is ordered by the Court that the motion of counsel for appellant to stay the issuance of the mandate of this Court

and to grant a stay of the injunction staying the order dissolving and vacating the restraining order filed on March 26, 1942 in the District Court, be, and it is hereby, denied.

[fol. 52] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PRAECIPE FOR RECORD—Filed May 28, 1942

Now comes G. F. Albin, as Petitioning Creditor herein, plaintiff-appellant, by Thomas S. McCabe, his attorney, and hereby indicates the following portions of the record to be contained in the record which the Clerk of this Court is hereby requested to prepare for filing in the Supreme Court of the United States:

1. The entire record in the District Court of the United States for the Northern District of Illinois, Eastern Division, known as cause No. 77464 in bankruptcy, heretofore transmitted to this Court and contained in the record on appeal to this Court.

2. The order of this Court entered on April 23, 1942, dismissing this appeal for lack of jurisdiction.

3. Application and order to stay mandate and to grant stay injunction staying order dissolving and vacating restraining order filed on March 26, 1942 in the District Court of the United States for the Northern District of Illinois, Eastern Division.

[fol. 53] 4. This Praecipe for Record.

Thomas S. McCabe, Attorney for Plaintiff-Appellant.

PROOF OF SERVICE

STATE OF ILLINOIS,
County of Cook, ss:

Thomas S. McCabe, being first duly sworn, on oath deposes and says that he served the foregoing Praecipe for Record on Henry J. and Charles Aaron, Sidney J. Hess, and Willard C. Walters, attorneys for the appellee in the

above entitled appeal, by mailing true copies thereof to them at their respective offices in Chicago, Illinois, on May 28, 1942.

Thomas S. McCabe.

Subscribed and sworn to before me this 28th day of May, A. D. 1942. E. R. Johnson, Notary Public. (Seal.)

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1942

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 234

G. F. ALBIN,

Petitioner,

vs.

COWING PRESSURE RELIEVING JOINT COMPANY, AN UNINCORPORATED COMPANY, ETC., ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LEWIS E. PENNISH,
Counsel for Petitioner.

THOMAS S. MCCABE,
Of Counsel.

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STATUTES CITED.

Bankruptcy Act of 1938, Chapter III, Section 11 ..... 3, 4, 5, 20, 24
Bankruptcy Act of 1938, Chapter IV, Section 24 ..... 11, 12
Judicial Code, Sec. 129 ..... 6, 10, 12, 13, 15, 18, 19
Judicial Code, Sec. 240 9

TEXT CITED.

Remington on Bankruptcy, Vol. 8, Section 3769 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 234

In the Matter of COWING PRESSURE RELIEVING JOINT COMPANY, AN UNINCORPORATED COMPANY OR ASSOCIATION, AN ALLEGED BANKRUPT.

PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Summary Statement of Matter Involved.

Your petitioner, G. F. Albin, praying for a Writ of Certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit dismissing an appeal "for lack of jurisdiction" from the District Court of the United States for the Northern District of Illinois, Eastern Division, respectfully submits:

This is a bankruptcy case. G. F. Albin, the petitioner herein, on February 9, 1942, filed his petition for involuntary adjudication of the respondent, Cowing Pressure Relieving Joint Company, an unincorporated company or association, an alleged bankrupt, containing the usual allegations (R. 1-3). On February 21, 1942, your petitioner

filed in said bankruptcy proceedings a petition for a restraining order, alleging that there were certain proceedings pending in the state courts of Illinois in one of which a counterclaim was pending against the alleged bankrupt in a sum in excess of $1,000 over all claims of the alleged bankrupt against the creditor, and in the other of which the creditor of the alleged bankrupt was suing for the sum of approximately $2,500 (R. 7-9). Your petitioner prayed *inter alia* that an order be entered restraining and enjoining the alleged bankrupt and said creditors from in any way prosecuting any and all suits, at law or in equity, against the alleged bankrupt until further order of court (R. 9). The petitioner further showed that unless said litigation in the state court was restrained and enjoined the assets of the alleged bankrupt might be dissipated and wholly lost to the estate, causing irretrievable damage to all the creditors including your petitioner (R. 8). On the same date upon which said petition was filed the Honorable Michael L. Igoe, one of the judges of said District Court, entered a restraining order restraining further prosecution of said two suits in the state courts of Illinois (R. 9-10).

On March 20, 1942, the alleged bankrupt filed an answer denying the allegations of the petition for involuntary adjudication in bankruptcy (R. 3-7). On the same date the alleged bankrupt also filed a petition to dissolve the restraining order, alleging that numerous hearings had been had in the first of the state court cases and that said proceeding was pending before the Master in Chancery to whom it had been referred; that said restraining order was obtained with notice to the first creditor but without notice to the alleged bankrupt; that "the sole purpose" for which bankruptcy proceeding was instituted was to defeat a claim of the alleged bankrupt against the first creditor; and that "'notwithstanding the motive

for the institution of this proceeding, it is to the best interests of the bankrupt estate" that the first state court proceeding continue before the Master in Chancery (R. 10-13).

Your petitioner thereupon filed a motion to dismiss the petition to vacate the restraining order, showing that in accordance with Chapter III, Section 11 of the Bankruptcy Act as amended in 1938 (usually called the Chandler Act), it was *mandatory* that all suits against an alleged bankrupt pending at the time of the filing of the bankruptcy petition be stayed until the debtor's adjudication or until dismissal of the bankruptcy petition (R. 13-14). Your petitioner further showed that the first of the two claims against the alleged bankrupt was a claim dischargeable in bankruptcy; that an answer had been filed to the involuntary petition for adjudication placing this cause at issue; and that your petitioner, as petitioning creditor, was ready, willing and able forthwith to proceed before the court or referee to try the issues raised by the bankruptcy petition (R. 14).

The petition of the alleged bankrupt to vacate the restraining order came on for formal hearing before the bankruptcy court, the Honorable John P. Barnes, Judge presiding, on March 26, 1942. As recited by the order entered on that date, the trial court examined the petition and was "fully advised as to the facts," although no evidence to support the petition to vacate was offered by the alleged bankrupt (R. 15). There is no foundation in the record for the alleged bankrupt's contention in the Circuit Court of Appeals for the Seventh Circuit, therefore, that this was a "perfunctory" order or was not based upon a full hearing before the trial court. At the close of the hearing Judge Barnes found that the court had jurisdiction of the parties and the subject matter and ordered that the restraining order entered by

Judge Igoe on February 21, 1942, restraining the prosecution of the state court proceedings, be vacated and that the alleged bankrupt be "hereby authorized to proceed in the same manner as if said (restraining) order, entered herein on February 21, 1942, had not been entered" (R. 15).

On March 31, 1942, your petitioner as appellant filed notice of appeal to the Circuit Court of Appeals for the Seventh Circuit (R. 16). Said appeal was thereafter perfected and the record on appeal filed and the case docketed in said court. On April 23, 1942, the Circuit Court of Appeals for the Seventh Circuit entered an order dismissing the appeal "for lack of jurisdiction" (R. 22). It is to review this order that this petition for certiorari is filed in this Court.

Statement of Basis of This Court's Jurisdiction.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case that it lacks jurisdiction over this appeal from an order in a bankruptcy case vacating a restraining order restraining litigation in the state court against an alleged bankrupt pending adjudication of the bankruptcy petition, under the *mandatory* provisions of Chapter III, Section 11, of the Bankruptcy Act of 1938, directly conflicts upon a question of federal law with decisions of other Circuit Courts of Appeal upon the same question.

The Questions Presented.

There are two questions presented:

1. Did the Circuit Court of Appeals for the Seventh Circuit lack jurisdiction of an appeal from an order vacating a restraining order entered in a bankruptcy case in the District Court, restraining the prosecution of litigation in the state courts against the alleged bankrupt

pending adjudication, which order vacating the restraining order was entered after a full hearing in the trial court?

2. Is the entry of a restraining order, pending adjudication of a bankruptcy petition, *mandatory* under Chapter III, Section 11, of the Bankruptcy Act of 1938?

Reasons for the Allowance of the Writ.

Under Chapter IV, Section 24, of the Bankruptcy Act of 1898, there was an appeal *as a matter of right* from the bankruptcy court to the Circuit Courts of Appeals only in the case of "controversies arising in bankruptcy proceedings." In the case of "proceedings" of the several inferior courts of bankruptcy, the several Circuit Courts of Appeals had jurisdiction, by petition for revision and not as a matter of right, "to superintend and revise in matter of law * * * the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

When the Bankruptcy Act of 1898 was amended in 1938 this distinction between "controversies arising in bankruptcy proceedings," in which the appeal was a matter of right, and the jurisdiction in the several Circuit Courts of Appeals "to superintend and revise in matter of law * * * the proceedings of the several inferior courts of bankruptcy within their jurisdiction," which was had by petition for revision and not as a matter of right, was abolished.

Under Section 24 of the Bankruptcy Act of 1938, usually called the Chandler Act, a party to bankruptcy proceedings is entitled to an appeal *as a matter of right* not only in "*controversies* arising in bankruptcy proceedings" but also in "*proceedings* in bankruptcy, either interlocutory or final"; and it was specifically provided that "such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Regardless, however, of the expansion of the right of appeal under the Chandler Act, the provisions of both the

Bankruptcy Act of 1898 and the Bankruptcy Act of 1938 specifically granted the respective Circuit Courts of Appeals "appellate jurisdiction" in bankruptcy cases, these words appearing in both Acts. The Circuit Courts of Appeals have uniformly been held by the decisions in those courts (with the single exception of the case at bar) as well as by the decisions in this Court to have jurisdiction of such appeals.

Moreover Section 129 of the Judicial Code specifically granted an appeal as a matter of right from interlocutory orders vacating or denying restraining orders; and the uniform decisions of the several Circuit Courts of Appeals and of this Court are to the effect that the several Circuit Courts of Appeals have jurisdiction of interlocutory orders vacating or denying restraining orders restraining state court proceedings under Section 129 of the Judicial Code.

It therefore amply appears that the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is directly in conflict upon a question of federal law with the decisions of the other Circuit Courts of Appeals and the decisions of this Court upon the same question.

The question involved is important. Litigants should not be deprived of their rights in one of the Circuit Courts of Appeals to an appeal upon the merits of a controversy which the federal statutes and the relevant decisions of the other circuits and of the Supreme Court all uniformly grant as a matter of right.

As to the second question, i.e., whether a stay of proceedings against an alleged bankrupt in the state courts must be stayed under the mandatory provisions of Section 24 of the Bankruptcy Act of 1898 and 1938, the decisions of the Circuit Courts of Appeals have uniformly held (again with the single exception of the case at bar) that such stay orders are mandatory pending adjudication of the bankruptcy petition. The decision of Judge Barnes

vacating the restraining order entered by Judge Igoe, which was based upon the allegations of the petition to vacate unsupported by any evidence, is squarely in conflict with the mandatory provisions of the Bankruptcy Acts and with all of the other decisions of the Circuit Courts of Appeals and of this Court on this question.

Here likewise the question involved is important because it is essential to the effective operation of the Bankruptcy Acts that the assets of the alleged bankrupt shall not be subject to possible dissipation and the rights of creditors prejudiced pending adjudication and the administration of the estate in bankruptcy or the determination that no cause for bankruptcy exists. These orders restraining state court proceedings against alleged bankrupts are entered as a matter of course in practically every bankruptcy proceeding; and the mandatory provisions of the Bankruptcy Acts in this regard are essential to the rights of all parties, including the rights of both the creditors and the alleged bankrupt.

If the clear language of the Bankruptcy Acts on both these points and the numerous decisions in the other Circuit Courts of Appeals and in this Court are to be overthrown, it should only be by a square decision of this Court to that effect.

Wherefore, petitioner prays that a Writ of Certiorari be issued under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the statutes of the United States; that said final order of said Circuit Court of Appeals be reversed or altered by this Honorable Court;

and petitioner also prays for such other, further or different relief as may seem proper.

And this petitioner will ever pray, etc.

G. F. ALBIN,
Petitioner,
By LEWIS E. PENNISH,
Counsel for Petitioner.

THOMAS S. MCCABE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

Neither the Circuit Court of Appeals for the Seventh Circuit nor the District Court of the United States for the Northern District of Illinois, Eastern Division, rendered any opinions in this case.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Seventh Circuit on April 23, 1942. A Writ of Certiorari is asked under Section 240 of the Judicial Code (Act of March 3, 1911 c. 231, Section 240, 36 Stat. 1157 as amended February 13, 1925 c. 229, Section 1, 43 Stat. 938).

Statement of the Case and Questions Presented.

For a statement of the case and of the questions presented see this Petition, pages 1 to 4.

Specification of Errors.

1. The Circuit Court of Appeals for the Seventh Circuit erred in dismissing the appeal to it from the District Court of the United States for the Northern District of Illinois, Eastern Division, for lack of jurisdiction.

2. The Circuit Court of Appeals for the Seventh Circuit erred in not granting said appeal and in not taking jurisdiction thereof.

3. The Circuit Court of Appeals for the Seventh Circuit erred in not deciding said appeal upon the merits.

4. The Circuit Court of Appeals for the Seventh Circuit erred in not reversing the order vacating the restraining order entered by Judge Igoe in the trial court on February

21, 1942 and in not continuing the restraining order in full force and effect pending adjudication of the bankruptcy petition.

ARGUMENT.

That the several Circuit Courts of Appeals do have jurisdiction of appeals from orders granting or dissolving restraining orders entered in the bankruptcy court staying or restraining actions in the state court when said orders have been entered after a full hearing in the bankruptcy court is now well-settled under the provisions of the Bankruptcy Acts and under Section 129 of the Judicial Code.

I.

The several Circuit Courts of Appeals have jurisdiction of all appeals from orders, interlocutory or final, entered in the bankruptcy court.

Under Section 24 of the Bankruptcy Act of 1898 there was an appeal as a matter of right from the bankruptcy court to the Circuit Courts of Appeals only in the case of "controversies arising in bankruptcy proceedings." In the case of "proceedings" of the several inferior courts of bankruptcy the several Circuit Courts of Appeals had jurisdiction only by petition for revision, and not as a matter of right, "to superintend and revise in matter of law * * * the proceedings of the several inferior courts of bankruptcy within their jurisdiction."

When the Federal Congress passed the Bankruptcy Act of 1938 (usually called the Chandler Act) the Legislature abolished this distinction between "*controversies* arising in bankruptcy proceedings," in which the appeal was a matter of right, and "*proceedings* of the several inferior courts of bankruptcy," in which the appeal was by petition for revision and not as a matter of right.

Under Section 24 of the Bankruptcy Act of 1938 (usually called the Chandler Act), a party to bankruptcy proceedings is now entitled to an appeal as a matter of right, not only "in *controversies* arising in proceedings in bankruptcy," but also "in *proceedings* in bankruptcy, either interlocutory or final"; and it was specifically provided that "such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal." It therefore follows that the appellant on this appeal had, as a matter of right under the Chandler Act, an appeal to the Circuit Court of Appeals for the Seventh Circuit from both *"proceedings"* in bankruptcy and *"controversies"* in bankruptcy, the distinction between them having been abolished in the new Bankruptcy Act of 1938.

Moreover under the provisions of both the Bankruptcy Acts of 1898 and 1938 the several Circuit Courts of Appeals were specifically granted "appellate jurisdiction" in bankruptcy cases. These words appear in both Acts, the only difference being that under the earlier Act the appeal was not a matter of right, whereas under the Chandler Act the appeal became a matter of right. Both Sections 24 granted the several Circuit Courts of Appeals jurisdiction of such appeals. Under the Bankruptcy Act of 1898 the "jurisdiction" in proceedings in bankruptcy was "to superintend and revise in matter of law" the proceedings below; whereas under the Bankruptcy Act of 1938 the "jurisdiction" of the Circuit Courts of Appeals in proceedings in bankruptcy, either interlocutory or final is "to review, affirm, revise or reverse, both in matters of law and in matters of fact."

It is therefore clear beyond any argument that the several Circuit Courts of Appeals do have appellate jurisdiction under the provisions of Section 24 of the Bankruptcy Act and that the Circuit Court of Appeals for the Seventh

Circuit had appellate jurisdiction of this appeal. The cases are cited in the following section of this brief.

II.

The order entered March 26, 1942 in the trial court, vacating the restraining order, is an appealable order.

Although Section 24 of the Bankruptcy Act of 1938 grants to the Circuit Courts of Appeals appellate jurisdiction "in proceedings in bankruptcy, either interlocutory or final," it does not follow that all interlocutory orders are appealable. The question therefore arises as to whether the interlocutory order entered by Judge Barnes vacating the restraining order entered by Judge Igoe is such an interlocutory order as may be appealed to the Circuit Court of Appeals.

The general rule as stated by Remington on Bankruptcy, Volume 8, Section 3769, is that: "Interlocutory orders which determine nothing are not reviewable." In determining what interlocutory orders do determine something and are therefore appealable, the federal courts have uniformly construed the provisions of the Bankruptcy Act and Section 129 of the Judicial Code together; and since Section 129 of the Judicial Code specifically provides that appeals may be taken from the District Courts to the Circuit Courts of Appeals from interlocutory orders denying or vacating restraining orders, the federal courts have uniformly held that appeals are proper from orders vacating or denying restraining orders which restrain state court proceedings under both the Bankruptcy Act and Section 129 of the Judicial Code.

In *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379, an order of the district court was entered staying an action at law in a chancery suit. The question was whether this interlocutory stay of an action at law was

appealable to the Circuit Court of Appeals for the Third Circuit. The Supreme Court held as stated in the syllabus that such a stay order was "in effect an injunction and, being interlocutory, is appealable to the Circuit Courts of Appeals," under the Judicial Code. Mr. Chief Justice Hughes, in his opinion, said (ps. 381-2):

> "A preliminary question arises as to the jurisdiction of the Circuit Court of Appeals. The decree of the District Court was interlocutory, and the question is whether it can be considered to be one granting an injunction and thus within the purview of § 129 of the Judicial Code (28 U. S. C. 227) permitting appeal. • • • The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings at law is a grant or refusal of an injunction within the meaning of § 129."

To the same effect is *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449, from the Circuit Court of Appeals for the Second Circuit. In that case the District Court denied an application for a stay of proceedings in an action at law on a contract until an arbitration could be had in accordance with the terms of the contract. Mr. Justice Brandeis held in his opinion (p. 451-2) that this in effect was an order denying an interlocutory injunction and was therefore appealable under Section 129 of the Judicial Code of the Circuit Court of Appeals.

In the case of *General Electric Co.* v. *Marvel Metals Co.*, 287 U. S. 430, the Supreme Court held that an interlocutory order refusing an injunction was appealable to the Circuit Court of Appeals for the Sixth Circuit under Section 129 of the Judicial Code. This Court by Mr. Justice Butler said (p. 432-3):

"The order dismissing the counterclaim is interlocutory. (Cases cited.) The general rule is that review of interlocutory orders must await appeal from the final decree. But in proceedings for injunctions and receivers exceptions have been made by § 129, Judicial Code:

'Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, or an interlocutory order or decree is made appointing a receiver, or refusing an order to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder, an appeal may be taken from such interlocutory order or decree to the circuit court of appeals. * * * The appeal * * * must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof * * *.' 28 U. S. C., § 227.

The reasons suggested by plaintiffs in support of the contention that the order is not appealable are that there was no hearing upon any application for an injunction and that the dismissal of the counterclaim was not the refusal of an injunction. But by their motion to dismiss, plaintiffs themselves brought on for hearing the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction * * *. It cannot be said, indeed plaintiffs do not claim, that the dismissal did not deny to defendants the protection of the injunction prayed in their answer. The ruling of the Circuit Court of Appeals that an injunction has been denied by an interlocutory order which is review-

able under § 129 is sustained by reason and supported by the weight of judicial opinion. *Emery* v. *Central Trust & Safe Deposit Co.*, 204 Fed. 965, 968. *Ward Baking Co.* v. *Weber Bros.*, 230 Fed. 142. *Historical Pub. Co.* v. *Jones Bros. Pub. Co.*, 231 Fed. 638, 643. *Naivette* v. *Philad Co.*, 54 F. (2d) 623. Cf. *Banco Mercantil* v. *Taggart Coal Co.*, 276 Fed. 388, 390. Plaintiffs' motion to dismiss the appeal was rightly denied."

It will be particularly noted that Mr. Justice Butler ruled that a hearing upon a motion to dismiss a counterclaim in which an injunction was prayed was a sufficient hearing upon an application for an injunction to render the dismissal of the counterclaim the equivalent of the refusal of an injunction by an interlocutory order and therefore appealable under Section 129 of the Judicial Code. This is precisely similar to the hearing before Judge Barnes in the case at bar upon the respondent's motion to vacate the restraining order upon which the trial court rendered the order vacating the restraining order appealed to the Circuit Court of Appeals for the Seventh Circuit in this case.

All of the relevant decisions in the Circuit Court of Appeals are, so far as is known to your petitioner, in accordance with the foregoing decisions in the Supreme Court.

In *Field* v. *Kansas City Refining Co.*, 296 Fed. 800, an order granting the right to commence suit in a state court but enjoining and restraining such suit until further order of court was held appealable to the Circuit Court of Appeals for the Eighth Circuit under Section 129 of the Judicial Code. The appellees moved to dismiss the appeal on the ground that this order was "not an interlocutory order granting, continuing, refusing, dissolving or refusing to dissolve an injunction" within the meaning of Section 129 of the Judicial Code. Judge Kenyon of the Circuit Court of Appeals for the Eighth Circuit said in his opinion (p. 802):

"This order was an appealable one under section 129 of the Judicial Code."

In *Western Union Telegraph Co.* v. *U. S. & M. T. Co.*, 221 F. 545, the district court entered an order restraining the prosecution of any actions at law in a foreclosure suit. The appellee contended that such orders were mere restraining orders and therefore not appealable. The Circuit Court of Appeals for the Eighth Circuit held that they were appealable and Judge Sanborn in his opinion (p. 553) said:

"The trust company contends they are mere restraining orders, and therefore are not appealable. But the acts of Congress provide that 'when, upon a hearing in equity in a District Court, or by a judge thereof in vacation, an injunction shall be granted, denied, refused, or dissolved, by an interlocutory order or decree, or an application to dissolve an injunction shall be refused,' an appeal may be taken from the order or decree. Conceding that a restraining order granted without a hearing is not ordinarily appealable, yet a restraining order which is granted, or sustained, or denied after a hearing of the parties, and which in effect and in everything but name, is a temporary injunction, falls within the evident meaning of the statute, and is reviewable by appeal, and the orders in question were of that character. The order refusing to dissolve and modifying the restraining order was made upon a hearing upon an application of the telegraph company to dissolve it, and in the later order the former was by the court itself called 'a restraining order and injunction,' so that the second order falls, not only within the true interpretation, but within the terms of the statute, and the appeal from it invokes a review of the order of the day before which conditioned its issue. Judicial Code § 129; *Griesa* v. *Mutual Life Ins. Co.*, 165 Fed. 48."

In *Griesa* v. *Mutual Life Ins. Co.*, 165 F. 48, an interlocutory order was granted in the district court staying

further proceedings in a law action. The order, although not using the technical words "restrain and enjoin," was in purpose and effect an order granting an injunction within the meaning of the statute. The opinion by Judge Van Devanter of the Eighth Circuit Court of Appeals (pp. 49-51) said:

> "The complainant then made in the suit in equity an application for 'an order staying all further proceedings' in the action at law, * * *
>
> From this order or decree the defendants appealed, and the insurance company now moves to dismiss the appeal, claiming that such an order or decree is not appealable. * * *
>
> As the order or decree in question was made upon a hearing in equity and was interlocutory, the decisive question is Did it grant an injunction? To us the answer does not seem doubtful. A court of equity possesses no power to stay proceedings in a court of law, save by granting an injunction against the litigant actors therein, and this is so well recognized that when, in a court of equity, a stay of proceedings in an action at law is sought or ordered, it is understood that it is this injunctive power that is invoked or exercised, although the technical terms 'restrain and enjoin' be not used. * * *
>
> We think the order or decree granted an injunction, and is within the statute before quoted, a manifest purpose of which is to enable the defendant to seek immediate appellate relief from an injunction, the continuance of which throughout the progress of the suit in which it is granted might seriously affect his interests. *Smith* v. *Vulcan Iron Works*, 165 U. S. 518.
>
> The motion to dismiss the appeal is accordingly denied."

The foregoing cases might be multiplied. They show beyond question that the Supreme Court and the Circuit Courts of Appeals have uniformly held that the Circuit

Courts of Appeals do have complete jurisdiction in equity cases over interlocutory injunction orders restraining or refusing to restrain prosecution of suits at law, regardless of whether the order is in the form of an injunction or a restraining order. These cases also show that the right of appeal specifically exists where the restraining order or injunction enjoins or restrains an action in another court.

The foregoing cases were decided under Section 129 of the Judicial Code. Where the same question as to the appealability of an order granting, continuing, refusing, dissolving or refusing to dissolve an injunction or restraining order enjoining or restraining an action in the state courts has come before the inferior courts of bankruptcy, the Circuit Courts of Appeals have likewise uniformly held that such orders are reviewable under the Bankruptcy Act and Section 129 of the Judicial Code.

In *McGonigle* v. *Foutch*, 51 F. (2d) 455, the bankruptcy court, under the Bankruptcy Act of 1898, restrained a proceeding in the state court. The Circuit Court of Appeals for the Eighth Circuit held that the granting of such a stay order, even though not technically a temporary injunction, was nevertheless appealable. The court said (p. 460):

> "We think this order of the District Court is appealable under Section 129 of the Judicial Code.
>
> 'Conceding that a restraining order granted without a hearing is not ordinarily appealable, yet a restraining order which is granted, or sustained, or denied after a hearing of the parties, and which in effect and in everything but name, is a temporary injunction, falls within the evident meaning of the statute, and is reviewable by appeal, and the orders in question were of that character.' *Western Union Telegraph Co.* v. *United States & M. T. Co.* (C. C. A. 8) 221 F. 545, 553; *Field* v. *Kansas City Refining Co.* (C. C. A. 8) 296 F. 800."

Likewise in *Seattle Curb Exchange* v. *Knight*, 46 Fed. (2d) 34, the Circuit Court of Appeals for the Ninth Circuit had before it an appeal from a bankruptcy case. The court held that whereas an order directing the referee to determine the right to the proceeds of sale of the bankrupt's seat on the Curb Exchange was interlocutory and therefore not appealable, nevertheless an order affirming an injunction order of the referee, enjoining a proceeding in the state court against the trustee, was appealable. The court concluded its opinion as follows (p. 36):

> "The above order of reference is no proper part of an order of injunction or of the order of affirmance thereof. Such an order of reference is interlocutory, and is not properly appealable (see *Grant* v. *Phoenix Mutual Life Insurance Co.*, 121 U. S. 118), while the order affirming the injunction of the referee is appealable. To avoid any inference that, by allowing the appeal from the order of May 5, 1930, we have passed upon this order of reference upon this appeal or have approved it, it will be stricken from the order appealed from, and, thus modified, the order of the District Court of May 5, 1930, affirming the injunction of the referee, is affirmed, without costs to appellant."

The foregoing *McGonigle* and *Seattle Curb Exchange* cases are both cases in bankruptcy and are therefore squarely in point to the effect that orders granting or vacating restraining orders or injunctions restraining or enjoining state court actions are appealable to the Circuit Court of Appeals. It is particularly noteworthy that in the *McGonigle* case the Circuit Court of Appeals for the Ninth Circuit relied not only on the provisions of the Bankruptcy Act permitting interlocutory appeals, but also upon Section 129 of the Judicial Code. Your petitioner knows of no authority contrary to the foregoing.

III.

It is mandatory that state court actions be stayed pending adjudication in bankruptcy under Section 11 of the Bankruptcy Act.

Section 11 of the Bankruptcy Act of 1938 is similar to the same section of the Bankruptcy Act of 1898 on the same point. The language of the latter statute is as follows:

> "a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, *shall be stayed* until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action *may be further stayed* until the question of his discharge is determined * * *." (Italics supplied.)

It appears from your petitioner's petition for a restraining order, and it is not denied by the respondent's petition to vacate the restraining order, that in the action before the master in chancery in the state court against the alleged bankrupt the alleged creditor of the bankrupt was claiming in excess of $1,000 from the alleged bankrupt after all just deductions and credits claimed by the alleged bankrupt had been allowed to him (R. 8). It further appears from your petitioner's motion to dismiss the respondent's petition for an order to vacate the restrainingg order that said action in the state court against the alleged bankrupt is founded upon a claim from which a discharge in bankruptcy against the alleged bankrupt would be a release (R. 14). It likewise appears from the foregoing pleadings in the bankruptcy court that said action in the state court against the alleged bankrupt was pending at the time of the filing of the involuntary petition for adjudication against the alleged bankrupt (R. 10).

Regardless of the merits of the claim against the alleged bankrupt, therefore, the language of Section 11 of the Bankruptcy Act is *mandatory* and requires that said state court action "*shall be stayed* until an adjudication or a dismissal of the petition" in bankruptcy; and it is only *after* such adjudication or dismissal of the bankruptcy petition that the district court may exercise its discretion as to whether to stay such actions.

In all of the cases in which this question has been considered by the state and federal courts with which your petitioner is familiar, it has been uniformly held that upon application to the bankruptcy court for an order staying state court proceedings against the alleged bankrupt, which are founded upon claims from which a discharge would be a release and which are pending at the time of the filing of the bankrupt's petition, must mandatorily be stayed by an appropriate restraining or injunction order in the bankruptcy court.

In the case of *In re Vadner*, 259 F. 614, decided in the District Court of Nevada, the court said (p. 636):

> "During the interval which elapses after petition filed and before adjudication or dismissal, *the application to stay must be granted. The language is mandatory.* After adjudication, whether a stay shall be granted is discretionary with the court." (Italics supplied.)

In the case of *In re Gerstenzang*, 52 Fed. (2d) 863, the District Court of New York said (p. 864):

> "Section 11 of the Bankruptcy Act (11 U. S. C. A. § 29), makes mandatory a stay of suits on dischargeable claims *until after adjudication or dismissal of the petition*, but it is well understood that a stay of such suits *after adjudication* is discretionary." (Italics supplied.)

In the case of *In re Locker*, 30 Fed. Supp. 642, the District Court of New York said:

> "It is clear that under Section 11 of the Bankruptcy Act, 11 U. S. C. A., § 29, *after there has been an adjudication of bankruptcy*, as in this case, this Court may exercise its discretion with respect to granting or refusing stays upon claims from which bankruptcy would be a discharge. See *In re Lesser*, 100 F. 433; *In re Mercedes Import Co.*, 166 F. 427; *McLeod* v. *Mills*, 29 Ga. App. 87, 113 S. E. 699." (Italics supplied.)

See also *Manufacturer's Finance Corp.* v. *Vye-Neill Co.*, 46 Fed. (2d) 146.

The supreme courts of the several states have reached similar conclusions upon the same points.

In *Star Braiding Co.* v. *Stienen Dyeing Co.*, 44 R. I. 8, 114 Atl. 129, the Supreme Court of Rhode Island held that Section 11 of the Bankruptcy Act of 1898, which contains the same language as to the staying of state court proceedings as the same section of the Bankruptcy Act of 1938, was mandatory in its effect and required the state court to stay the proceedings even in the absence of a stay order in the bankruptcy court. The court said (p. 129-130):

> "The plaintiff seeks to support the action of said justice upon the authority of statements contained in the text of Collier on Bankruptcy (12th Ed.) Vol. 1, p. 291, and in certain federal cases cited by the author in his footnotes to the effect that the power of the court to stay a suit against a bankrupt is discretionary. The stay to which the author and the cases cited by him have reference is not the stay sought by this defendant on its motion, but a stay after an adjudication of bankruptcy, or one in the nature of an injunction, issued by a federal court to restrain an action

against a bankrupt in a state court, or a stay in an action begun against a bankrupt after the filing of a petition in bankruptcy against him. The power to grant such stays is discretionary. But none of them is within the provisions contained in the first part of Section 11. *Until after an adjudication or dismissal of the petition against an alleged bankrupt a suit which is founded upon a claim for which a discharge would be a release and which is pending against the alleged bankrupt at the time of filing such petition must be stayed.* Of such nature is the plaintiff's claim, and such was the condition of his suit at the time of defendant's motion for a stay. *The language of the Bankruptcy Act is peremptory.* The action should have been stayed. In Collier on Bankruptcy (12th Ed.) Vol. 1, p. 287, the author says:

'Stays of suits under the present law are, strictly speaking, confined to actions pending at the time of the bankruptcy. *They are mandatory if before the adjudication and discretionary after it.* • • • The stay of suits against the bankrupt pending the bankruptcy proceeding is *absolutely necessary* to give effect to the present bankruptcy act.'" (Italics supplied.)

To the same effect is *Orgill Bros.* v. *Coleman*, 146 Miss. 217, 111 Southern 291.

We conclude, therefore, that clearly under the language of the Bankruptcy Acts of 1898 and 1938 and the Judicial Code, the Circuit Court of Appeals for the Seventh Circuit had appellate jurisdiction of the order vacating the restraining order restraining prosecution of an action in the state court and that the order of the Circuit Court of Appeals for the Seventh Circuit dismissing the appeal "for lack of jurisdiction" should be reversed. It is further clear that there is ample justification for this Court entering a final order disposing of said appeal on the ground that the restraint of the action in the state court

is mandatory under the provisions of Section 11 of the Bankruptcy Act of 1938.

Respectfully submitted,

LEWIS E. PENNISH,
Counsel for Petitioner.

THOMAS S. MCCABE,
Of Counsel.

(1173)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 234

G. F. ALBIN,

Petitioner,

v.

COWING PRESSURE RELIEVING JOINT COMPANY, an unincorporated company, etc., et al.,

Respondent.

REPLY BRIEF FOR PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 234

In the Matter of

COWING PRESSURE RELIEVING JOINT COMPANY, an Unincorporated Company or Association,

An Alleged Bankrupt.

REPLY BRIEF FOR PETITIONER.

Respondent makes three points in its brief. Each of them is without merit.

I.

Respondent says that the restraining order should not have been entered in the bankruptcy court because the proceeding entitled "*Felix B. Kilbride, as Administrator with the will annexed of the Estate of Michael Masterson, deceased*, Plaintiff, v. *Peter Masterson, et al.*, Defendants, No. 34S 18698 in the Superior Court of Cook County" was

not a case which was brought and prosecuted *against* the bankrupt but was a case which was brought and prosecuted *by* the bankrupt (Respondent's Brief, pp. 3, 5, 13-17).

There is no merit to this contention. The sworn petition for restraining order upon which the restraining order of February 21, 1942 was based alleged that there were two cases pending against the bankrupt: (1) the proceeding in the Superior Court of Cook County aforesaid, and (2) a suit by the National Lead Company for approximately $2,500 pending in The Municipal Court of Chicago (R. 8-9). The allegations of the sworn petition for restraining order with regard to the proceedings in the Superior Court of Cook County were that

> "in said proceedings the said Thomas Hart Fisher filed certain counterclaims alleging that instead of being indebted to the said debtor in the various sums claimed that the alleged bankrupt is indebted to said Fisher after all just deductions and credits in a sum which your petitioner is informed will exceed approximately $1,000" (R. 8).

Respondent attacks said allegation that said Fisher counterclaimed for more than the claims against him in a sum in excess of approximately $1,000 by showing that in respondent's sworn petition to set aside the restraining order filed March 20, 1942 respondent had alleged

> "that the so-called counterclaim of Thomas Hart Fisher against this petitioner, set forth in the petition for the restraining order entered herein on February 21, 1942, is without merit" (R. 12).

Respondent also says (p. 13) that Fisher's counterclaim contains "no prayer for affirmative relief" and (p. 14) that the counterclaim "was filed only upon information and belief." No Record references are given, and the Record contains no such evidence.

It will thus be seen that the most that can be said as to Fisher's counterclaim is that petitioner's sworn petition for restraining order filed February 21, 1942 alleged that he is a creditor in a sum in excess of approximately $1,000 (R. 8), and that said counterclaim against respondent is a claim dischargeable in bankruptcy (R. 14); whereas respondent in his sworn petition to set aside restraining order filed March 20, 1942 alleges that said counterclaim of Fisher is without merit.

The Record therefore does not sustain respondent's repeated assertions (except by ignoring petitioner's sworn petition) that Fisher's claim against the alleged bankrupt is not a claim *against* the alleged bankrupt, but is a claim *by* the alleged bankrupt against Fisher.

Moreover respondent completely ignores the pending litigation brought by National Lead Company for approximately $2,500 against the alleged bankrupt upon which suit was pending in The Municipal Court of Chicago. The sworn allegation of the petition for restraining order filed February 21, 1942 with regard to this suit was as follows:

> "Your petitioner further represents that in addition to the aforementioned suit, the National Lead Company of Chicago, Illinois has instituted an action in The Municipal Court of Chicago against the bankrupt herein, in which suit the National Lead Company alleges there is due to it the sum of approximately $2,500. Your petitioner therefore states that said suit should likewise be restrained until the further order of this Court." (R. 9).

None of these allegations regarding the suit of National Lead Company *against* respondent have ever been disputed by respondent either in the bankruptcy court or in the respondent's brief in this Court.

The restraining order entered February 21, 1942 restrained both Fisher and National Lead Company from prosecuting their respective claims against the alleged bankrupt until further order of the bankruptcy court (R. 9).

It follows, therefore, there is no substance to respondent's contention in its brief that the two suits aforesaid were not suits *against* the alleged bankrupt but were suits *by* the alleged bankrupt.

II.

Respondent next contends that an order dissolving a restraining order restraining two actions in the state courts against the bankrupt is "routine" or "perfunctory," and therefore is not appealable (Respondent's Brief, pp. 10-13).

Respondent challenges what it says is petitioner's erroneous assumption "that the Bankruptcy Act of 1938 enlarged the scope of the appellate review" (R. 6-7); and respondent argues that, without such enlargement, orders dissolving restraining orders restraining state court proceedings against an alleged bankrupt would not be appealable.

There is no merit to either assumption. Petitioner argued that under § 24 of the Chandler Act a party to bankruptcy proceedings is entitled to an appeal as a matter of right in both *controversies* and *proceedings* in bankruptcy. (Petitioner's Brief, pp. 5-6, 10-12). This point is conceded by respondent (R. 5-6).

The cases cited in petitioner's brief (pp. 12-19) holding that an interlocutory order dissolving a restraining order restraining state court proceedings is an appealable order were decided under § 129 of the Judicial Code and under

the Bankruptcy Act of 1898. If, therefore, the Chandler Act did not "restrict" the appealability of such orders (and no such claim is made by respondent), then clearly such orders are appealable under § 129 of the Judicial Code and under the Bankruptcy Acts of 1898 and 1938, whether or not the latter "enlarged the scope of appellate review" of the former.

Respondent attempts to distinguish petitioner's cases by contending that in *Enelow* v. *New York Life Ins. Co.*, 293 U. S. 379; *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, 293 U. S. 449; *Griesa* v. *Mut. Life Ins. Co.*, 165 Fed. 48; *McGonigle* v. *Foutch*, 51 F. (2d) 455; *Seattle Exchange* v. *Knight*, 46 F. (2d) 34; *General Electric Co.* v. *Marvel Metals Co.*, 287 U. S. 430; *Field* v. *Kansas City Refining Co.*, 296 F. 800; and *Western Union Telegraph Co.* v. *U. S. & M. T. Co.*, 221 F. 545, "the order in substance and effect was an injunction," whereas in the case at bar the order was a mere "restraining order" (Respondent's Brief, pp. 11-13).

Not only is this attempted distinction not made by these cases, but it is squarely refuted by them.

In the *Enelow* case Mr. Chief Justice Hughes held that the grant or refusal of an order of the District Court staying an action at law in a chancery suit, although neither an "injunction" nor a "restraining order" by its terms, was nevertheless to be "considered to be one granting an injunction and thus within the purview of § 129 of the Judicial Code (28 U. S. C. 227) permitting appeal."

In the *Shanferoke* case Mr. Justice Brandeis held in his opinion that an order denying a stay of proceedings in an action at law was in effect an order denying an interlocutory injunction and was therefore appealable.

In the *General Electric Co.* case this Court held that an interlocutory order refusing an injunction was appealable. In that case a counterclaim seeking an injunction was dismissed and the court held the order of dismissal to be appealable under § 129 of the Judicial Code.

In the *Western Union Telegraph Co.* case the very same argument was advanced which is here made, *i.e.*, that an order restraining the prosecution of an action at law was not an injunction, and therefore not appealable. Judge Sanborn for the Eighth Circuit Court of Appeals held that such a restraining order, "in effect and in everything but name, is a temporary injunction" and therefore "falls within the evident meaning of the statute, and is reviewable by appeal."

In the *Griesa* case Judge VanDevanter of the Eighth Circuit Court of Appeals held that "an order staying all further proceedings" in an action at law is understood to be invoking or exercising the injunctive power of the court, "although the technical terms 'restrain and enjoin' be not used."

The *McGonigle* case, which was decided under the Bankruptcy Act of 1898, was to the same effect. Respondent says (pp. 11-12) that this case is not in point because in the *McGonigle* case the persons restrained had "substantially adverse rights from those of the bankrupt estate" whereas in the case at bar "the issue involved" related to "a perfunctory restraining order which might be entered as a matter of course." There is no merit to this attempted distinction. The Circuit Court of Appeals for the Eighth Circuit squarely held that the granting of a stay order staying proceeding in a state court was appealable, even though not technically a temporary injunction.

Respondent attempts to distinguish the *Seattle Curb Exchange* case by stating that in that case the order in the bankruptcy court was entered "after hearing." We were careful to show in our original petition (pp. 3-4) that on March 26, 1942 a full and formal hearing took place before the bankruptcy court, the Honorable John P. Barnes judge presiding, and that as shown by the order entered on that date the trial court examined the petition and was "fully advised as to the facts," although respondent failed to offer proof to support its petition to vacate (R. 15).

The language in the *Field* case quoted by respondent (Respondent's Brief, p. 12) shows that the court was concerned with whether the order was "in effect a temporary injunction" and that the court was helped to its conclusion so finding because the order in that case both restrained and enjoined the state court proceeding and was therefore "in name *also*" an injunction.

Thus we say that petitioner's cases squarely refute the attempted distinction urged by respondent in its brief.

Moreover the cases cited by respondent do not sustain this attempted distinction.

The case of *Hoehn* v. *McIntosh*, 110 Fed. (2d) 199, held that the Chandler Act did not extend the scope of an appeal from an interlocutory order permitting the sale of certain property. This had been the rule under the prior bankruptcy acts and the case was, therefore, properly decided. The decision had no bearing upon an order in the bankruptcy court restraining proceedings in the state court.

The case of *In Re National Finance & Mortgage Corp.*, 96 Fed. (2d) 74, likewise involved the right of the trustee

to sell real estate and was therefore not in point. It does appear that in that case the court attempted to distinguish the appealability of *restraining orders* from the appealability of *injunction orders* under § 129 of the Judicial Code. Whether such a distinction has any merit in connection with the sale of real estate we deem irrelevant to the issues in this case as to an order staying, restraining, or enjoining state court proceedings.

The case of *In Re Chotiner*, 218 Fed. 813, also involved an order of the District Court reversing an order of the referee confirming a sale of the bankrupt's property, the effect of which was to leave the property still in the hands of the trustee. Such an order might readily be unappealable without in any way affecting the appealability of the order in the case at bar.

We conclude that there is no merit to respondent's attempted distinction between "staying" or "restraining" orders on the one hand, and "injunction" orders on the other, where the issue relates to the staying of state court proceedings pending adjudication in the District Court.

III.

Respondent's final point is that § 11 of the Chandler Act making mandatory the restraining of state court proceedings against the bankrupt pending adjudication or dismissal of the bankruptcy petition is "for the sole benefit of the alleged bankrupt" and "may be waived by him" (Respondent's Brief, pp. 17-20).

There is no justification in § 11 of the Chandler Act for any such contention. Obviously the sole purpose of the mandatory provisions of the Act is to protect the bankrupt estate for the benefit of its creditors. The reason that ac-

tions against the bankrupt are mandatorially stayed prior to adjudication and only permissibly stayed after adjudication is that prior to adjudication there is no trustee in bankruptcy to protect the interests of the creditors. If actions against alleged bankrupts pending adjudication are not stayed, there is nothing to prevent a creditor friendly to the bankrupt from prosecuting an action against him and securing a preference to the disadvantage of all of the other creditors of the estate. It is therefore correct to state that § 11 of the Chandler Act is for the benefit of the bankrupt but utterly incorrect to state that it is for the *sole* benefit of the bankrupt.

Indeed in the case at bar petitioner showed by his sworn petition that if the counterclaim brought by Fisher against the alleged bankrupt were not restrained and enjoined "there is grave and imminent danger that this principal asset of the debtor may be dissipated and wholly lost to this estate" and "if this asset is lost to this estate there will be irretrievable damage incurred to all of the creditors, including your petitioner" (R. 8).

The "danger" and "damage" here referred to was the risk that the litigation of the claims and counterclaims involved in the Fisher litigation might dissipate the entire estate. This is shown by petitioner's allegation (R. 8) that "it is to the best interest of the creditors of this estate that when an adjudication has been entered in these proceedings and a trustee in bankruptcy has been duly elected by the creditors that the said trustee should investigate all of the facts pertaining to this subject matter and that this Court should have jurisdiction in marshalling and collecting the said asset for the benefit of all the creditors." Thus it will be seen that this was the very sort of a case

which § 11 of the Chandler Act was designed to cover; and that unless such state court proceedings as this be stayed, the bankrupt's estate and all of the creditors interested therein would or could suffer irretrievable injury as plaintiff's sworn petition alleged.

Respondent's citations (Respondent's Brief, pp. 18-20) are not in conflict with the foregoing conclusion. The text writers and the cases there cited show that a bankrupt who fails to interpose his discharge in bankruptcy in a state court proceeding resulting in a judgment against the bankrupt following his discharge is deemed to have waived the benefits of § 11 of the Chandler Act. The quotation from Remington on Bankruptcy, volume 7, § 3467 is part of Chapter LIII dealing with "Effect of Discharge"; and the quotations from 8 Corpus Juris Secundum, pp. 1366 and 1369, also relate to the bankrupt's opportunity to "plead or set up his discharge."

In the case of *Johnson Dry Goods Co.* v. *Drake*, 121 So. 402, the suit against the bankrupt was already in the Supreme Court of Alabama when the bankrupt, who was the appellee, was adjudicated. The trustee in bankruptcy declined to intervene or defend for the bankrupt in that stage of the proceedings; and the court cited *Boynton* v. *Ball*, 121 U. S. 457 in support of the proposition that the bankrupt might waive his right to interpose his discharge, at the same time deciding the appeal in favor of the bankrupt.

In *Craig* v. *Cameron*, 108 S. E. 828, it was held that the bankrupt did not waive his right to a permanent injunction under § 11 of the Chandler Act, where he obtained his final discharge after judgment against him in the trial court.

In *Hamilton* v. *First State Bank of Garrison*, 220 N. W. 644 the bankrupt was allowed a perpetual stay where his discharge was granted after the judgment was rendered.

In *In Re S. W. Straus & Co., Inc.*, 6 Fed. Supp. 547, the court held that the purpose for which the suit in equity was brought by third parties, after the bankruptcy proceeding was filed but prior to adjudication, was not to recover a provable debt against the bankrupt estate, but was primarily to secure relief against property not belonging to the bankrupt deposited with third persons. At the time the stay was sought the bankrupt had not even been served with process; and the District judge held that such a suit would not interfere with the jurisdiction of the bankruptcy court and was moot until the bankrupt should be served with process.

In *In Re Hoey Tilden & Co.*, 292 Fed. 269, Judge Learned Hand held that the suit in the state court was not to establish a provable debt against the bankrupt estate, but was to establish a trust in specific property and "that such an action has nothing whatever to do with claims *in personam* against the bankrupt, *i.e.*, with any 'debts' ". Another action was a claim for money had and received against the bankrupt which was a dischargeable debt; and as to this claim the district judge held that the bankrupt might get a stay, but not the receiver of the bankrupt's property, because the receiver was only interested in protecting the property in his hands and not in protecting the bankrupt against suits *in personam*. The judge also said (page 271):

> "The judgment if obtained would not be a liquidation of the claim against the estate, which has no interest in the action. Therefore the receiver's motion is denied so far as concerns that suit."

It is to be noted that none of the cases cited by respondent were decided in the Circuit Courts of Appeals. For the reasons indicated they have no hearing upon the issue as to the right of the petitioning creditor to move in the bankruptcy court for a mandatory order under § 11 of the Chandler Act upon a showing of irretrievable damage and danger that the debtor's estate might be dissipated and wholly lost if the restraining order prayed be not entered.

CONCLUSION.

Respondent makes no mention of the failure of the Circuit Court of Appeals for the Seventh Circuit to consider the merits of the appeal. If the order appealed from were appealable, clearly the Circuit Court of Appeals was in error in dismissing it upon its own motion "for lack of jurisdiction" (R. 22). Clearly, also, the Circuit Court of Appeals should have granted petitioner's motion for a supersedeas, for a stay of the mandate, and for a stay injunction pending this appeal (R. 22-9).

It is earnestly submitted that the Circuit Court of Appeals should have granted the litigants the right to be heard upon the issue of its jurisdiction, and should not have dismissed the appeal peremptorily upon its own motion. Petitioner has never had his day in court in the Circuit Court of Appeals upon this question. Having so disposed of the appeal without granting petitioner any right to be heard upon the question of jurisdiction, the Circuit Court of Appeals should surely have granted the petitioner the right to a supersedeas or should have stayed the mandate or itself entered a stay injunction pending the appeal of this Court.

It is respectfully submitted that the order of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the cause remanded to the District Court in Bankruptcy, with discretion to enter an order staying or restraining the two state court proceedings as required by the mandatory provisions of §11 of the Bankruptcy Act of 1938.

Respectfully sumitted,

LEWIS E. PENNISH,
Counsel for Petitioner.

THOMAS S. MCCABE,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 234

G. F. ALBIN,

Petitioner.

vs.

COWING PRESSURE RELIEVING JOINT COMPANY, AN UNINCORPORATED COMPANY, ETC., ET AL.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW.

Neither the Circuit Court of Appeals for the Seventh Circuit nor the District Court of the United States for the Northern District of Illinois, Eastern Division, rendered any opinions in this case.

JURISDICTION.

The order of the Circuit Court of Appeals was entered April 23, 1942 (R-22), and a Petition for rehearing was denied May 16, 1942.

STATEMENT.

This proceeding is an application for review of an order of the Circuit Court of Appeals for the Seventh Circuit dismissing an appeal from an interlocutory order (R-15), vacating a restraining order entered on February 21, 1942 (R-9) on motion of petitioner restraining proceedings in which the respondent was the party plaintiff, and particularly a proceeding pending in the Superior Court of Cook County, Illinois case Number 34 S 18698, entitled "*Felix Kilbride, etc.* v. *Masterson et al.*" (hereinafter referred to as the Superior Court Case).

The order entered on February 21, 1942, was entered without notice to the respondent, but with notice to Thomas Hart Fisher, an attorney at law practicing in Chicago, Illinois, (hereinafter in this brief referred to as "Fisher") (R-19).

On March 20, 1942, the respondent filed his answer to the petition for adjudication (R-3) setting forth in substance the following defenses to the petition for adjudication:

(1) The respondent is not insolvent.

(2) The respondent has more than twelve creditors in number, but the petition for adjudication was filed by only one creditor.

(3) The so-called petitioning creditor, G. F. Albin, is not a person entitled to file a petition for adjudica-

tion and in fact is acting for and on behalf of Fisher who is a debtor and not a creditor of the respondent.

The detailed facts which support the allegation that Fisher is the true owner of the claim on which the petition for adjudication purports to be predicated are set forth in the respondent's answer (R-5) and in the petition to vacate the restraining order, filed March 20, 1942 (R-10).

As appears from the pleadings in this proceeding Fisher filed no counterclaim or claim for affirmative relief in the Superior Court Case, and the order entered on March 26, 1942 is not an order permitting the prosecution of a proceeding against the respondent. On the contrary, it is an order permitting the prosecution of a proceeding by the respondent against Fisher for the purpose of collecting assets of the respondent. The collection of such assets pending hearing on the petition for adjudication, rests in the sound discretion of the District Court. If Fisher has any claim for affirmative relief against the respondent, he did not present the same for adjudication in the Superior Court Case. The proceeding in the Superior Court Case, which petitioner sought to restrain involved only a petition by respondent against Fisher (R-10) (R-8) to recover a sum in excess of $11,000.00 held by Fisher and belonging to petitioner. The title of said Superior Court case should not mislead the Court as the issues of the original proceedings were determined by final decree entered January 15, 1937. The pending petition therein against Fisher was predicated on the retention by the Chancery Court in said decree of jurisdiction of the trust there involved and attorney and client relation between Fisher and the respondent in said case.

Subsequent to the entry of the order by the District Court on March 26, 1942, the issues of the petition for adjudication in bankruptcy and the respondent's answer were referred to and are pending before a referee in bankruptcy. Several hearings have been had and Fisher, who became an attorney of record for the petitioner, G. F. Albin, in the District Court Case, will be permitted to introduce further evidence on such issues, if any he has, on September 8, 1942. If respondent is adjudged bankrupt and a trustee appointed or if the bankruptcy proceeding is dismissed, the order entered on March 26, 1942, will be of no significance. It is anticipated that said proceedings will be concluded before the issue herein can be determined by this Court and the questions involved therefore are academic.

The answer of respondent (R-6) and the petition to vacate the restraining order (R-12), allege that the bankruptcy proceeding was instituted for the sole purpose of defeating the claim of the respondent against Fisher, and that consistent with this purpose, the petitioner forthwith, upon the acquisition of his claim from the trustee in bankruptcy for Peter Masterson individually (R-5), filed this proceeding, (R-1) and without notice to the respondent, caused the restraining order, which was dissolved on March 26, 1942, to be entered. Notwithstanding the motive for the institution of this proceeding, it is to the best interest of the petitioner's estate that the proceedings pending in the Superior Court of Cook County, Illinois, be completed, and if the petitioner be adjudged a bankrupt, the recovery in said proceeding will inure to the benefit of the bankrupt estate.

QUESTIONS INVOLVED.

The respondent states that the questions properly involved in this application for Certiorari are the following:

1. Did the Circuit Court of Appeals for the Seventh Circuit lack jurisdiction of an appeal from an interlocutory order vacating an order, entered in a bankruptcy proceeding by the District Court, restraining the prosecution of litigation in the State Courts by the alleged bankrupt against others pending adjudication?

2. Is the entry of a restraining order by the District Court pending hearing on a petition for adjudication in bankruptcy mandatory under Chapter III, Section 11 of the Bankruptcy Act of 1938 where

A. The application for the restraining order seeks to restrain proceedings *by* rather than *against* the alleged bankrupt, and

B. The application for the restraining order is not made by the alleged bankrupt, but is made by a creditor of the alleged bankrupt.

REASONS FOR DISALLOWANCE OF WRIT.

It is submitted, as will more fully appear from the respondent's brief, that the petitioner erroneously relies on Sections 11 and 24 of the Bankruptcy Acts of 1898 and 1938 and Section 129 of the Judicial Code in support of his application for a writ of Certiorari.

It is conceded that the Bankruptcy Act of 1938 permits appeals as a matter of right in certain *proceedings* in bankruptcy, either interlocutory or final, which prior to the Bankruptcy Act of 1898 were appealable only upon

petition for leave to appeal. However, the petitioner erroneously assumes that the Bankruptcy Act of 1938 enlarged the scope of the appellate review by making reviewable certain types of interlocutory orders, which prior thereto, were not reviewable on petition for leave to appeal. As will later more fully appear, the respondent submits that the Bankruptcy Act of 1938 did not broaden the scope of appeal.

Petitioner further contends that Section 129 of the Judicial Code permits appeals as a matter of right from interlocutory orders vacating or denying *restraining* orders. It is submitted that this conclusion of the petitioner is erroneous and, as will appear from the respondent's brief, Section 129 of the Judicial Code applies only to *injunctions* as distinguished from *restraining* orders.

It is further submitted that the petitioner has misconceived the purpose of Section 11 (a) of the Bankruptcy Act of 1898. This section has been incorporated in the act for the benefit of the alleged bankrupt or bankrupt, and does not authorize the District Court to restrain proceedings by an alleged bankrupt against others, or to restrain proceedings to which the alleged bankrupt is party, upon application of a creditor of the alleged bankrupt.

Therefore, the petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

BRIEF AND ARGUMENT.

I.

The order entered March 26, 1942 is not an appealable order.

Although Section 24 of the Bankruptcy Act of 1898 as amended vests the United States Circuit Courts of Appeals with appellate jurisdiction from the several courts of bankruptcy in proceedings in bankruptcy *"other interlocutory or final"*, the amendment effected by the Chandler Act permitting review upon appeal in lieu of petition for leave to appeal or petition to revise merely altered the method of review, but did not enlarge the scope of appellate review. Prior to the Chandler Act, certain types of interlocutory orders were reviewable. Other types of interlocutory orders were not reviewable. Only the orders reviewable prior to the Chandler Act by petition for leave to appeal or to revise are now reviewable on appeal. The rule is stated in *Remington on Bankruptcy*, Volume 8, Section 3768:

> "The Chandler Act continues the jurisdiction to review both interlocutory and final orders in proceedings. It gives an appeal of right unless less than $500.00 is involved, while under prior law, an appeal could not be taken unless allowed by the Appellate Court. The cases under subdivision (b) of Section 24 as originally enacted in which Circuit Courts of Appeals refused to allow appeals on the ground that certain kinds of interlocutory orders in proceedings are not appealable, remain authoritative. The Chandler Act has made no change in

the law as to the appealability of interlocutory orders in proceedings."

In *Hochn* v. *McIntosh* (C. C. A. 6 1940), 110 Fed. (2d) 199, an appeal was taken from an order permitting the sale of certain property in the State Court. The appellee urged that the appeal was premature and the question arose whether the appeal might not be proper under the Chandler Act, even though improper prior thereto. The Court said:

> "The Statute, as it existed prior to the amendment, has been considered in numerous decisions, the rationale of which is that appeals from purely intermediate and preliminary orders should be allowed only in exceptional cases. So far as is material to the question under consideration, the amendment made no change in the law. Before reviewable, administrative orders must have a certain degree of finality. The salutary purpose of the legislation would be destroyed if every order, no matter how trivial, were subject to review. The Act does not contemplate tying up the estate and prolonging administration by appeals, unless the subject has been finally disposed of in the lower court and practically nothing remains to be done in that respect, so that rights may be definitely determined by review. *Triangle Electric Company* v. *Foutch*, 8 Cir. 40 F. (2d) 353; *Board of Road Comr's* v. *Keil*, 6 Cir., 259 F. 76; *In re Fox West Coast Theatres*, 9 Cir., 88 F. (2d) 212; *In re Throckmorton*, 6 Cir., 196 F. 656."

It generally has been held that orders dissolving restraining orders are of such an interlocutory nature that they are not appealable for the reason that they do not constitute a final adjudication of the rights of the litigants.

In re National Finance and Mortgage Corporation (C. C. A. 9, 1938), 96 Fed. (2d) 74, the District Court

entered an order dissolving an order temporarily restraining proceedings prohibiting the trustee for bondholders from selling realty secured by a trust deed conveying property owned by the bankrupt corporation. The Circuit Court of Appeals dismissed the appeal, stating that the restraining order was not the equivalent of an injunction within the meaning of Sections 128 and 129 of the Judicial Code as amended, 28 U. S. C. A. Sections 225, 227, and therefore was not an appealable order. The Court said:

> "Section 129 provides for appeals where an injunction is (*inter alia*) 'refused, or dissolved by an interlocutory order or decree.' In the present case the order appealed from recites the issuance of restraining orders and of an order to show cause why appellee should not be enjoined. However, the decretal portion of the order goes no further than to dissolve the temporary restraining order. It is entirely silent upon the subject of injunction. Thus, while this order did purport to dissolve a temporary restraining order it did not 'refuse or dissolve' an injunction, and consequently is not appealable under section 129. *Pack* v. *Carter*, 9 Cir. 1915, 223 F. 635; *Pressed Steel Car Co.* v. *Chicago & Alton R. Co.*, 7 Cir. 1911, 192 F. 517, 519; *Bank of America Nat. Trust & Savings Ass'n* v. *Cuccia*, 9 Cir. 1937, 93 F. (2d) 754."

Appeals from interlocutory orders are denied where the interlocutory order contains no final adjudication. The theory of these denials is expressed in *In re Chotiner* (C. C. A. 3, 1914), 218 Fed. 813, wherein the appeal was dismissed. The Court said:

> "The opinion of the District Judge in this case is reported in 216 Fed. at page 916. We recognize the desirability of deciding the conflict of opinion in this circuit on the point in dispute (*Re Codori* (D. C.) 207 Fed. 784), and we regret that this record presents no reviewable question. Section 24b does

not require us to revise every interlocutory order that may affect the course of a bankruptcy proceeding, whatever the nature or scope of the order may be; and we need hardly add that it is not part of our duty to answer questions, unless they arise in a proper appellate proceeding. Under section 24b we can only be asked to review such orders or decrees when they have a certain degree of definiteness and finality. Moreover, there must always be numerous minor matters of administration in which the District Court should be allowed to exercise a sound discretion that will ordinarily not be disturbed.

"In the case before us the court has taken no positive, affirmative, step in the cause, and has done nothing to affect definitely the rights of the petitioner. The record discloses merely an order by the District Judge reversing an order of the referee that confirmed a sale of the bankrupt's property, thus leaving the property still in the hands of the trustee. Collier (9th Ed.) 530; Black, Sec. 52; *Sturgiss* v. *Corbin* (C.C.A. 4th Cir.), 141 Fed. 1, 72 C. C. A. 179."

Likewise, see *Remington on Bankruptcy*, Volume 8, Section 3769.

None of the cases cited by the Petitioner on pages 12-19 of his brief support his statement that a restraining order of the nature entered by the District Court on February 21, 1942 and dissolved on March 26, 1942, is an appealable order under Section 129 of the Judicial Code, or that such a restraining order is the equivalent of an injunction. The restraining order involved in this case purports to have been a routine restraining order entered under Section 11 (a) of the Bankruptcy Act. It is not the equivalent of an order entered on a complaint in equity and answer, or on a petition and answer, invoking the general equitable powers of courts. It merely purported to be a perfunctory routine order of the nature

customarily entered in bankruptcy proceedings by authority of the Bankruptcy Act. We will proceed to distinguish the cases cited by the petitioning creditors-appellant.

Enelowe v. *New York Life Insurance Company*, 1934, 293 U. S. 379, 79 L. Ed. 440, and *Shanferoke Coal & Supply Corporation* v. *Westchester Service Corporation*, 1934 293 U. S. 449, 79 L. Ed. 583, were companion cases decided at the same term of Court. The issue involved in these cases was the power of a court of equity to restrain proceedings at law between the same parties to enable the parties litigant to interpose equitable defenses under the provisions of Section 274(b) of the Judicial Code. As the Court pointed out in the Enelowe Case at page 383, this was the exercise by a court in a proceeding of the same general equitable powers that in the absence of the provisions of the Judicial Code would be exercised by a separate complaint in equity. The Court stated:

> "It is thus apparent that when an order or decree is made under Section 274 (b) requiring or refusing to require that an equitable defense shall first be tried, the Court exercises what is essentially an equitable jurisdiction and in effect grants or refuses an injunction restraining proceedings at law precisely as if the Court had acted upon a bill of complaint in a separate suit for the same purpose."

The Court in these cases, therefore, properly came to the conclusion that as the order in substance and effect was an injunction, the designation of the order as a restraining order was not of significance under Section 129 of the Judicial Code.

The same distinction is apparent on an examination of the case of *Griesa* v. *Mutual Life Insurance Company*, 1908, 165 Fed. 48, cited by the petitioner.

The case of *McGonigle* v. *Foutch*, 1931, 51 Fed. (2d)

455, although a bankruptcy case, is not comparable to the present situation. In that proceeding the trustee in bankruptcy, upon notice and after hearing, obtained an order restraining persons having substantially adverse rights from those of the bankrupt estate from proceeding in the State Court. The proceeding before the referee was in the nature of an injunction proceeding to enjoin State Court proceedings against the trustee in bankruptcy. The issue involved was not a perfunctory restraining order which might be entered as a matter of course under the provisions of the Bankruptcy Act. The case, therefore, is not in point.

The same comment applies to the case of *Seattle Curb Exchange* v. *Knight*, 1931, 46 Fed (2d) 34. This case likewise involved an order restraining proceedings against a trustee in bankruptcy in the State Court, after a hearing. The order entered in that case, as will appear even from the brief of the petitioner, was referred to as an injunction order and not a restraining order.

The case of *General Electric Company* v. *Marvel Metals Co.*, 287 U. S. 430, was an ordinary counterclaim in a patent suit, and is not pertinent to the issues of this case.

Field v. *Kansas City Refining Company*, 296 Fed. 800, was not a bankruptcy case and likewise is not in point. As a matter of fact, in that case the Court said:

> "Not only was the order in effect a temporary injunction, but it was such in name also."

The case of *Western Union Telegraph Company* v. *United States M. A. T. Co.*, 1915, 221 Fed. 545, involved the exercise of ordinary equity jurisdiction in an insolvency proceeding, and did not involve a perfunctory restraining order. It will be noted from an examination of this case that the trial court itself in referring to its

own order designated the same as a "restraining order and injunction."

It is submitted, therefore, that the authorities cited by the petitioner do not support the statements contained in his brief.

As the order entered March 26, 1942, from which the appeal is taken, is not appealable, the Circuit Court of Appeals may either enter an order dismissing the appeal or affirming the order of the District Court.

Federal Land Bank of Springfield v. *Hansen*, (C. C. A. 2, 1940), 113 Fed. (2d) 82.

II.

(a) An order restraining proceedings by an alleged bankrupt is not within the scope of Section 11(a) of the Bankrupt Act.

The pleadings filed by Fisher in the Superior Court of Cook County, Illinois, contain no prayer for affirmative relief. The Civil Practice Act of the State of Illinois requires that claims for affirmative relief shall be contained in a counterclaim. Section 35 of the Civil Practice Act of the State of Illinois, 110 Smith-Hurd Illinois Annotated Statutes, Section 162, provides as follows:

> "(1) Subject to rules, any demand by one or more defendants against one or more plaintiffs, or against one or more co-defendants, whether in the nature of set-off, recoupment, cross-bill in equity or otherwise, and whether in tort or contract, for liquidated or unliquidated damages, or for other relief, may be

pleaded as a cross-demand in any action, and when so pleaded shall be called a counterclaim.

"(2) The counterclaim shall be a part of the answer, and shall be designated as a counterclaim.

"(3) Every counterclaim shall be pleaded in the same manner and with the same particularity as a complaint, and shall be complete in itself, but allegations set forth in other parts of the answer may be incorporated by specific reference instead of being repeated."

Not only did Fisher fail to file a counterclaim in the State Court proceedings in accordance with the rules, but he did not request affirmative relief in the answer or supplemental answer filed by him. Furthermore, the petition for the restraining order, filed on February 21, 1942, alleges that a counterclaim was filed, only upon information and belief. The information and belief of the petitioner obviously is misconceived. The restraining order entered on February 21, 1942, therefore restrained a proceeding *by* the alleged bankrupt and in so far as it applied to the said Superior Court case, did not restrain a proceeding *against* the alleged bankrupt. Title to this claim remains in the alleged bankrupt, notwithstanding the filing of the petition. The rule is stated in *Remington on Bankruptcy*, Volume 4, Section 1364, as follows:

"In the meantime, the bankrupt has sufficient title to maintain suits in his own name, at any rate where no receiver has been appointed, or where title and not merely possessory right is essential to maintenance of the suit."

The leading case in support of this rule of law is *Johnson* v. *Collier*, 1912, 222 U. S. 538, 56 L. Ed. 302, in which the Court said:

"While for many purposes the filing of the petition operates in the nature of an attachment upon choses

in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt' as of the date of adjudication.

"Until such election the bankrupt has title,—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court, in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of, rights and priorities thereby acquired. *Thatcher* v. *Rockwell*, 105 U. S. 469, 26 L. Ed. 950."

The rule is stated also in *Danciger* v. *Smith*, 1928, 276 U. S. 542, 72 L. Ed. 691. In this case the bankrupt had assigned certain claims. Following adjudication suit was started by the bankrupt on these claims and the defense was interposed that by reason of the bankruptcy, the bankrupt had ceased to be the owner of the cause of action and was not entitled to prosecute the suit. The defendants contended that by permitting a bankrupt to continue the prosecution after adjudication, they were deprived of a right, privilege and immunity under the Bankruptcy Act. In reviewing this contention and in permitting the continuation of the proceeding, the Court

quoted with approval from *Johnson* v. *Collier*, and further said:

> "It is clear that under these provisions (of the Bankruptcy Act, U. S. C. title 11) an adjudication in bankruptcy, until followed by the appointment of a trustee, does not divest the bankrupt's title to a cause of action against a third person or prevent him from instituting or maintaining suit thereon. Thus, he may institute and maintain such a suit before the election of a trustee (citing cases). Or, if no trustee is appointed (citing cases) it follows that Smith's title to the right of action was not divested by the proceeding in bankruptcy, no trustee having been appointed to whom it could pass; and that the Bankruptcy Act did not prevent him from subsequently prosecuting the suit to judgment."

In the later case of *In re Olsen, O'Neill* v. *Lange, et al.*, (C. C. A. 2, 1934), 70 Fed. (2d) 253, the Court said:

> "Moreover, a stay granted upon the appointment of a receiver would be pursuant to section 11a of the Bankruptcy Act (11 U. S. C. A. Sec. 29(a)) which refers to suits or actions pending against a person at the time of the filing of the petition against him. To stay suits previously instituted by the bankrupt would require an order of the court obtained by the trustee."

Restraint of proceedings *by* (and not *against*) an alleged bankrupt, is not within the scope of Section 11(a) relied upon by the petitioner-creditor-appellant. The restraint of all proceedings other than such restraining orders as may be mandatory before adjudication under Section 11(a) rests within the sound discretion of the District Court. The rule is stated in *Remington on Bankruptcy*, Volume 8, Section 3804, as follows:

> "The Appellate Court's discretion must not be substituted for that of the lower court."

To the same effect are:

New River Coal Company v. *Ruffner Brothers* (C. C. A. 4, 1908), 165 Fed. 881.

In re Lesser, (C. C. A. 2, 1900), 99 Fed. 913, and

In re S. W. Straus & Co., Inc. (D. C. N. Y. 1934), 6 Fed. Supp. 547, which will be discussed later.

The comment of the court in *In re Margolies* (C. C. A. 2, 1920), 266 Fed. 203, is noteworthy.

> "We have pointed out that under the statute discretionary orders can be revised only for abuse of discretion, which is error of law (*In re Weidenfeld*, 254 Fed. 680, 166 C. C. A. 175) and that while we can review interlocutory proceedings, it is not advisable so to do (*In re Strauss*, 211 Fed. 123, 127 C. C. A. 521; *In re Horowitz*, 250 Fed. 106, 162 C. C. A. 278). As, however, this record raises nothing but a question of jurisdiction, and one of some novelty, we conclude to entertain the petition, as an exception to, and not a relaxation of, the general rule above stated."

It is submitted, therefore, that even if the order appealed from should be considered an appealable order, the record so clearly supports the order entered by Judge Barnes on March 26, 1942 that the order entered by him ultimately must be affirmed.

(b) Section 11 (a) relied on by the petitioner as authority for his appeal is a provision for the sole benefit of the alleged bankrupt, and does not authorize the District Court to restrain proceedings on application of persons other than the alleged bankrupt before adjudication, or the bankrupt after adjudication.

The peitioner relies solely on Section 11 (a) as authority for the restraining order. Conceding for the moment

that there is merit to the contention of the appellant that the order entered on March 26, 1942, affects proceedings against the bankrupt, and conceding further that the restraining order would be entered upon proper application of the bankrupt and that upon such application the order would be mandatory before adjudication, the protection afforded by Section 11 (a) is for the benefit of the bankrupt and may be waived by him. If the bankrupt does not request the entry of a restraining order, there is no authority which permits a creditor to obtain such an order. The rule is stated in Remington on Bankruptcy, Volume 7, Section 3467 as follows:

> "The stay under Section 11 (11 U. S. C. A. Sec. 29) is for the benefit of the bankrupt to enable him to interpose his discharge. And it is only under this provision that the bankrupt may apply to the bankruptcy court for a stay to protect his discharge. *It is not under this provision that the bankruptcy court acts in staying or restraining suits or proceedings affecting the property of the bankrupt belonging to creditors.*" (Italics supplied.)

The rule is stated also in 8 Corpus Juris Secundum, Section 491, at page 1366, referring to Section 11 of the Bankruptcy Act:

> "This section is controlling and determinative of the right to stay *where the application for a stay is made by the bankrupt, or alleged bankrupt,* himself in an ordinary bankruptcy proceeding. The purpose of this Section and of a stay granted thereunder is to relieve the bankrupt pending his application for discharge from being unnecessarily harassed by creditors holding dischargeable claims and to preserve the *status quo* in civil actions against him until he shall have an opportunity plead or set up his discharge." (Italics supplied.)

In the same work it is stated at page 1369:

> "The provision of the Bankruptcy Act which permits the bankrupt to obtain a stay of suits against him is primarily for his benefit and the right conferred thereby may be waived by him."

The following cases support this rule of law:

Johnson Dry Goods Company v. *Drake*, 121 Southern 402, 219 Ala. 150.

Craig v. *Cameron*, 108 S. E. 828; 27 Ga. App. 455.

Hamilton v. *First State Bank of Garrison*, 220 N. W. 644, 57 N. Dak. 142.

In re S. W. Straus & Co., Inc., D. C. N. Y. 1934, 6 Fed. Supp. 547.

In re Hoey Tilden & Co., D. C. N. Y. 1922, 292 Fed. 269.

In *In re S. W. Straus & Co., Inc.*, (D. C. N. Y.), 6 Fed. Supp. 547, in an involuntary proceeding prior to adjudication, the petitioner sought an order restraining certain proceedings against the bankrupt. In denying the claim that such an order should be entered under Section 11 (a), the Court said:

> "The power of the bankruptcy court to stay suits brought in other courts, state or federal, relates to two types of cases. The first is the restraining of suits brought against the bankrupt on claims that in their nature are dischargeable in bankruptcy. This power is expressly conferred by section 11a of the Bankruptcy Act (11 U. S. C. A. Sec. 22(a)). The purpose is to relieve the bankrupt from being unnecessarily harassed by creditors pending his application for discharge. *In re Nuttal* (D. C.), 201 F. 557, 559. The exercise of this power is an everyday occurrence; as a general rule the bankrupt himself is the party who invokes it and the suit involved is generally a suit to establish a personal liability. The present application is obviously not of this sort, though both the moving party and the plaintiffs refer in their memoranda to the provisions of Section 11."

It is manifest that each and every case cited by the petitioner as authority under Section III of his brief is a proceeding in which the application for a restraining order was made by the bankrupt or alleged bankrupt himself and no case is cited in which a restraining order was entered on the application of a creditor. It is submitted, therefore, that conceding for the moment that the order entered on March 26, 1942, restrained proceedings against the bankrupt, an application in accordance with the Statute was not made for the restraint of such proceedings.

CONCLUSION.

For the reasons herein set forth the decision below is correct and the petition for a writ should be denied.

Respectfully submitted,

PETER MASTERSON, not personally but as trustee under the four-party Trust Agreement dated August 5, 1921 by and between JOHN P. COWING, ET AL., Respondent.

By CHARLES AARON,
SIDNEY J. HESS, JR.,
WILLARD C. WALTERS,
Counsel for Respondent.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1942

No. 234

G. F. ALBIN,

Petitioner,

vs.

COWING PRESSURE RELIEVING JOINT COMPANY, AN UNINCORPORATED COMPANY, ETC., ET AL.,

Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

By its opinion dated December 7, 1942 this Court has reversed and remanded this cause to the Circuit Court of Appeals for the Seventh Circuit without, however, determining the single (and simple) question of Federal law presented on this appeal.

It is respectfully and earnestly submitted on behalf of petitioner that this Court should itself decide this case *upon the merits.*

It was fully shown in the petition for certiorari that this case involves a question of Federal law, *i.e.*, whether Section 11 of the Bankrutcy Act of 1938 mandatorily requires the stay of State Court proceedings pending against an alleged bankrupt between the date of the filing of the petition in bankruptcy and the date of adjudication on such petition. It was upon this ground that this Court granted certiorari herein. The importance of this question was likewise stressed in the petition for certiorari.

That this Court does have ample jurisdiction to dispose of this case upon this issue of Federal law *upon its merits* has been determined by countless decisions of this Court; and such right is clearly granted to this Court by Sections 240 and 269 of the Judicial Code.

As said in *Donovan* v. *Pennsylvania Co.*, 199 U. S. 279 (p. 292): "As this case is before us on writ of certiorari, we can dispose of all questions arising on the record."

In the case of *Camp* v. *Gress*, 250 U. S. 308, this Court said (p. 318):

> "In cases coming from federal courts the Supreme Court is given by statute full power to enter such judgment or order as the nature of the appeal or writ of error (or certiorari, § 240 of the Judicial Code) requires. Revised Statutes, § 701. Circuit Court of Appeals Act of March 3, 1891, c. 517, § 11, 26 Stat. 826, 829. See also § 10 of the same act. Compare *Ballew* v. *United States*, 160 U. S. 187, 198, *et seq.* And by Act of February 26, 1919, c. 48, 40 Stat. 1181, amending § 269 of the Judicial Code, the duty is especially enjoined of giving judgment in appellate proceedings 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.'"

It is particularly appropriate that this Court exercise its power to dispose of the entire merits of a question of Federal law where the appeal is from an *interlocutory* order in the trial court. Interlocutory appeals reaching this Court under Section 129 of the Judicial Code have invariably been disposed of *upon the merits* in this Court. Each of the following cases involved an interlocutory appeal; and in each of them this Court decided the merits of the controversy.

Smith v. *Vulcan Iron Works*, 165 U. S. 518;
Mast, Foos & Co. v. *Stover Mfg. Co.*, 177 U. S. 485;
Metropolitan Water Co. v. *Kaw Valley Drainage District*, 223 U. S. 519;
Eagle Glass v. *Mfg. Co.* v. *Rowe*, 245 U. S. 275;
Meccano, Ltd. v. *Wanamaker*, 253 U. S. 136;
Deckert v. *Independence Corp.*, 311 U. S. 282.

The question presented on this appeal is one which arises very generally in bankruptcy proceedings. The Supreme Courts of the several States, as well as the Federal Courts, have been asked to pass upon the mandatory provisions of the Bankruptcy Act with regard to the stay of state court proceedings pending at the time the bankruptcy petition is filed and prior to adjudication. Since it is clear that this important question of Federal law can *never* reach this Court *except* upon an interlocutory appeal, it is additionally important that this Court pass upon the merits of this appeal at this time while it has the opportunity to do so.

The question as to whether a state court proceeding pending against an alleged bankrupt at the time the petition in bankruptcy was filed *must be stayed pending adjudication under Section 11 of the Bankruptcy Act of 1938* has been squarely presented in this case.

It is accordingly respectfully urged that this Court should decide this case upon the merits and should render an opinion accordingly.

Respectfully submitted,

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THOMAS S. MCCABE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 234.—October Term, 1942.

G. F. Albin, Petitioner, *vs.* Cowing Pressure Relieving Joint Company, etc., et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[December 7, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner filed an involuntary petition in bankruptcy against respondent who answered denying the allegations of the petition. Prior to adjudication, the bankruptcy court entered an *ex parte* order on petition of the same creditor restraining the prosecution by respondent or its agents of a suit in the Illinois state courts on a claim against one Fisher in which suit, it was alleged, Fisher had filed counterclaims which would exceed the amount of the respondent's claim. Thereafter on petition of respondent and after notice to all parties and a hearing the bankruptcy court vacated the restraining order. This likewise was, so far as appears, prior to an adjudication. Petitioner appealed. The Circuit Court of Appeals dismissed the appeal "for lack of jurisdiction." The case is here on certiorari.

Sec. 24(a) of the Chandler Act (52 Stat. 854, 11 U. S. C. § 47) gives the Circuit Courts of Appeals appellate jurisdiction from courts of bankruptcy "in proceedings in bankruptcy, either interlocutory or final". An order of the bankruptcy court vacating a restraining order against prosecution of a suit in a state court is, like a stay order itself, a proceeding in bankruptcy. See *Harrison Securities Co.* v. *Spinks Realty Co.*, 92 F. 2d 904; *Taylor* v. *Voss*, 271 U. S. 176, 181. The amendments to § 24(a) made by the Chandler Act practically abolished the distinction between appeals as of right and by leave. S. Rep. No. 1916, 75th Cong., 3d Sess., p. 4. And see *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 385-388. Whatever may still be the possible limitations on the reviewability of interlocutory orders (see *In re Hotel*

Governor Clinton, Inc, 107 F. 2d 398; *Federal Land Bank* v. *Hansen,* 113 F. 2d 82, 84-85), no reason appears why this one cannot or should not be reviewed. Nor does it appear from the record which is before us that the issue is moot. We intimate no opinion on the merits. The judgment is reversed and the cause remanded to the Circuit Court of Appeals for proceedings in conformity with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.